# TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1[illegible]5

No: [illegible]. 10

ALBERT C. TWINING AND DAVID C. CORNELL,
PLAINTIFFS IN ERROR,

vs.

THE STATE OF NEW JERSEY.

IN ERROR TO THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY.

FILED JANUARY 4, 1888.

(20,508.)

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a New Jersey Court of Errors and Appeals.

STATE OF NEW JERSEY, Defendant in Error,
*vs.*
ALBERT C. TWINING and DAVID C. CORNELL, Plaintiffs in Error.

In Error to the Supreme Court.

*Case.*

Henry M. Nevius, Prosecutor of the Pleas, and Attorney for Defendant in Error.

Edward M. Colie, Attorney for Albert C. Twining, Plaintiff in Error.

Vredenburgh, Wall and Van Winkle, Attorney- for David C. Cornell, Plaintiff in Error.

1 NEW JERSEY, *ss:*

The State of New Jersey to the Chief Justice and other Justices of our Supreme Court of Judicature, Greeting:

[L. S.]

Forasmuch as in the record and proceedings, and also in the giving of judgment upon a certain indictment against Albert C. Twining and David C. Cornell, late of the City of Asbury Park, in the County of Monmouth, for exhibiting to an Examiner of the State Banking Department, a certain false paper consisting of a typewritten copy of a minute of an alleged meeting of the Board of Directors of the Monmouth Trust and Safe Deposit Company *pro ut* the said indictment whereof they were indicted and convicted by a certain jury of Monmouth County taken between the State of New Jersey and the said Albert C. Twining and David C. Cornell, which was in our Supreme Court of Judicature before you between the said State of New Jersey and the said Albert C. Twining and David C. Cornell, defendants, as it is said, manifest error hath intervened to the great damage of the said Albert C. Twining and David C. Cornell, as from their complaint we have information, we being willing in their behalf to correct the error in due manner, if any there shall be, and that speedy justice be done to them, the said Albert C. Twining and David C. Cornell, command you that if judgment be thereon given, then that you send to our judges of our Court of Errors and Appeals in the last resort in all causes at Trenton, on the sixteenth day of December, next, distinctly and openly under your seal, the record and proceedings and judgment aforesaid, with all things touching and concerning the same, together with
2 this writ, that the record and proceedings aforesaid being inspected, we may cause to be further done thereupon for correcting that error, what of right and according to the laws and custom of the State of New Jersey ought to be done.

Witness our Chancellor and President Judge of our said Court of Errors and Appeals at Trenton aforesaid, the twenty-ninth day of November, nineteen hundred and five.

S. D. DICKINSON, *Clerk.*

EDWARD M. COLIE,
*Attorney for Albert C. Twining.*
VREDENBURGH, WALL & VAN WINKLE,
*Attorneys for David C. Cornell.*

The answer of the Justices of the Supreme Court of the State of New Jersey within named. The record and proceedings whereof mention is within made, with all things touching and concerning the same, we do certify to the Court of Errors and Appeals of said state, in a certain schedule to this writ annexed, as within we are commanded.

WILLIAM S. GUMMERE, *C. J.*

3, 4 & 5

NEW JERSEY, *ss:*

The State of New Jersey to Wilbur A. Heisley, Esquire, Judge of the Court of Common Pleas of the County of Monmouth, constituting the Court of Quarter Sessions holden at Freehold in and for the County of Monmouth of the term of January, nineteen hundred and four:

[L. S.]

Because in the record and process and also in giving of judgment upon a certain indictment against Albert C. Twining and David C. Cornell, late of the City of Asbury Park, in said County of Monmouth, for unlawfully, wilfully and knowingly presenting, showing and exhibiting to Larue Vredenburg, an Examiner of the Banking and Insurance Department of the State of New Jersey, a certain false paper purporting to be the minutes of an alleged special meeting of the Board of Directors of the Monmouth Trust and Safe Deposit Company, a trust company of this State, *pro ut* the said indictment whereof before you they have been indicted and thereof convicted by a certain jury of the county taken between the State of New Jersey and the said Albert C. Twining and David C. Cornell as it is said manifest error hath intervened to the great damage of the said Albert C. Twining and David C. Cornell, as from their complaint we have information, we being willing in their behalf to correct the error in due manner if any there shall be, and that speedy justice be done to them, the said Albert C. Twining and David C. Cornell, command you that if judgment be thereon given then that you send to our justices of our Supreme Court of judicature at Trenton on the 23d day of May, inst., distinctly — *-gether with this writ; that*

6 the record and proceedings aforesaid, with all things touching and concerning the same, together with this writ; that the record and proceedings aforesaid being inspected we may cause to be further done thereupon for correcting that error what of

right and according to the laws and customs of the State of New Jersey ought to be done.

Witness William S. Gummere, Esquire, Chief Justice of our said Supreme Court at Trenton aforesaid the third day of May, in the year nineteen hundred and four.

E. W. ARROWSMITH, *Attorney.*

WM. RIKER, JR., *Clerk.*

The answer of Wilbur A. Heisley, Judge of the Court of Common Pleas of the County of Monmouth, constituting the Court of General Quarter Sessions in and for said county within named, the record and proceedings, and all things touching and concerning the same whereof mention is within made, to the Supreme Court of the State of New Jersey within specified, at the day and place within named, I certify in a schedule annexed to this writ as I am within commanded.

WILBUR A. HEISLEY,
*Presiding Judge of Monmouth Quarter Sessions.*

7 STATE OF NEW JERSEY, *County of Monmouth, ss:*

Be it remembered, That at a Court of Oyer and Terminer held at Freehold in and for the said County of Monmouth on the first Tuesday of January, one thousand nine hundred and four, before J. Franklin Fort, Esquire, one of the associate justices of the Supreme Court of Judicature of the State of New Jersey and Wilbur A. Heisley, Esquire, judge of the Inferior Court of Common Pleas and of the General Sessions in and for the said County of Monmouth according to the form of the statute in such case made and provided by the oaths of

1. Frank L. Ten Broeck.
2. Nathan J. Taylor.
3. William M. Conover.
4. Laurence Price.
5. Henry Campbell.
6. Lee Deedmeyer.
7. Charles P. Conover.
8. Jeremiah S. Stillwell.
9. Richard Carr.
10. John Holihan.
11. Holmes V. M. Dennis.
12. Ten Eyck Conover.
13. James P. Hendrickson.
14. George W. Morris.
15. Augustus W. Chandler.
16. John Daly.
17. Edson W. Cleveland.
18. Albert L. Ivins.
19. Asbury F. Walling.
20. Daniel E. Mahoney.
21. Alfred S. Hall.

22. James H. Clark.
23. Daniel Hills.

good and lawful men of said County of Monmouth, then and there duly summoned and then and there duly sworn and charged by the said J. Franklin Fort, judge as aforesaid, presiding in said
8 Court of Oyer and Terminer in and for the said County of Monmouth, to inquire in behalf of the State of New Jersey in and for said County of Monmouth.

It is presented in manner and form following, to wit:

MONMOUTH COUNTY, *To wit:*

The Grand Inquest of the State of New Jersey for the body of the County of Monmouth, upon their respective oaths present:

That Albert C. Twining and David C. Cornell, both late of the City of Asbury Park, in the said County of Monmouth, being directors and officers of the Monmouth Trust and Safe Deposit Company, a corporation duly organized and existing under the laws of this state, on the nineteenth day of January, in the year of our Lord nineteen hundred and three, fraudulently, wilfully and intentionally did take and appropriate to their own use the sum of thirty thousand and forty-eight dollars and seventy-seven cents, being the funds, money and property of the said Trust Company, and did use the said moneys for the purpose of acquiring a large number of the certificates of shares of the capital stock of the First National Bank of Asbury Park, body corporate, organized under the laws of the United States of North America, said shares of stock being purchased and acquired for the sole use and benefit of the said Albert C. Twining and David C. Cornell and not for the use and benefit of the said trust company.

And the Grand Inquest further presents that the said Albert C. Twining and David C. Cornell, then and there each being a director and officer of the said trust company, body corporate, and intending to conceal the fact that they so appropriated, converted and misapplied the said sum of money, being the property of the said trust company as aforesaid, and intending to deceive any person authorized to examine as to the condition of such trust company and to conceal from such person the fact of the misappropriation, misuse, misapplication and conversion of the said funds of the said trust company as aforesaid by the said Albert C. Twining and David C. Cornell, and intending to deceive such person by making him be-
9 lieve that the said Albert C. Twining and David C. Cornell had used said funds of the trust company for the purpose of purchasing of three hundred and eighty-one shares of the stock of the First National Bank aforesaid which stock was to be the property of the said trust company and not the property of the said Albert C. Twining and David C. Cornell, and intending to deceive such person so authorized to examine as to the condition of the *such* trust company, by making him believe that such purchase of stock and the use of said money had been authorized by a resolution passed at a special meeting of the Board of Directors of the said trust com-

pany held at the office of the company on the ninth day of Febraary, nineteen hundred and three, the said Albert C. Twining and David C. Cornell, on the fourteenth day of February, in the year aforesaid, at the City of Asbury Park, in the county aforesaid and within the jurisdiction of this court they each being then and there a director and officer of the said trust company, with intent to deceive as aforesaid, Larue Vredenburg, he being a person authorized to examine as to the condition of such trust company, did knowingly exhibit, present and show and cause to be exhibited, presented and shown to the said Larue Vredenburg, a certain false paper of the following tenor and effect, viz:

Monmouth Trust and Safe Deposit Company, Asbury Park, N. J.

A special meeting of the Board of Directors of this company was held at the office of the company, Monday, February 9, 1903.

There were present the following directors:

George F. Kroehl, G. B. M. Harvey,
S. A. Patterson, A. C. Twining,
D. C. Cornell.

The minutes of the regular meeting held Jan. 15th, 1903, were read, and on motion, duly approved.

All loans taken since the last meeting were gone over carefully, and upon motion, duly seconded, were unanimously approved.

A resolution that this company buy three hundred and eighty-one shares of the stock of the First National Bank, at $44,875, was adopted.

On motion, the meeting adjourned.

10 And the Grand Inquest further presents that there had been no special meeting of the Board of Directors of the Monmouth Trust and Safe Deposit Company held at the office of the company on Monday the ninth day of February, nineteen hundred and three, and that no resolution or action of any kind had been taken by the directors of said company relative to the purchase by the said company of any of the shares of stock of the First National Bank, and that the said paper so presented, exhibited and shown, was false and fraudulent and that the said Albert C. Twining and David C. Cornell knew that it was false and fraudulent at the time of the exhibition, presenting and showing of it to the said Larue Vredenburg, contrary to the form of the statute in such case made and provided, and against the peace of this state, the government and dignity of the same.

JOHN E. FOSTER,
*Prosecutor of the Pleas.*

11 And afterwards, to wit, on Monday, the twenty-fifth day of January, in the year of our Lord one thousand nine hundred and four, at a session of the Court of General Quarter Sessions aforesaid, being as yet of the term of January aforesaid, before the Honorable Wilbur A. Heisley, Esquire, judge aforesaid, at Feehold afore-

said, in the County of Monmouth aforesaid, it is by the Court ordered that all the indictments be filed and retained in the Court of General Quarter Sessions for trial.

Whereupon, on Thursday, the fourth day of February, in the year of our Lord one thousand nine hundred and four, at a Court of General Quarter Sessions, at Freehold, in and for the County of Monmouth aforesaid, as yet of the term of January aforesaid, before Wilbur A. Heisley, Esquire, Judge of the Court of General Quarter Sessions aforesaid, here cometh the said Albert C. Twining and David C. Cornell, who being brought to the bar in their proper persons by Obadiah C. Bogardus, sheriff of the County of Monmouth aforesaid, to whom they are also here committed, and having heard the indictment read, and forthwith being commanded of and concerning the premises in the said indictment above specified, and charged them how they will acquit themselves thereof, say they are not guilty thereof, and thereof for good and evil they put themselves upon the country, and John E. Foster, Esquire, Prosecutor of the Pleas for said County of Monmouth, who prosecutes for the State of New Jersey, doth the like.

Therefore let the said indictment be continued until March the first, one thousand nine hundred and four, and a jury.

12 Monmouth Quarter Sessions.

STATE
*vs.*
ALBERT C. TWINING and DAVID C. CORNELL.

Indictment—Exhibiting False Minutes.

Plea Withdrawn, March 1, 1904.

The defendants being set to the bar, withdraw their plea of not guilty, and through their counsel, move to quash the indictment, and after having heard the argument of the counsel for the defendants, and also the Prosecutor of the Pleas, the Court denied the motion to quash.

13 STATE
*vs.*
ALBERT C. TWINING and D. C. CORNELL.

Indictment—Exhibiting False Minutes.

The defendants being again set to the bar, pleads not guilty.

14 Thereupon comes here before the judge aforesaid, at Freehold aforesaid, in the County of Monmouth aforesaid, on the first day of March, nineteen hundred and four, as yet of the term of January, nineteen hundred and four, twelve good and lawful men, each of whom shall be a citizen of this state and resident within the County of Monmouth, above the age of twenty-one years and under the age of sixty-five years, by whom the truth of the matter may be

better known, and who are not of kin to the said Albert C. Twining nor David C. Cornell, to recognize upon their oaths whether the said Albert C. Twining and David C. Cornell be guilty of exhibiting false minutes to the banking examiner of the state of New Jersey in the indictment aforesaid specified, or not guilty, because as well the said John E. Foster, Prosecutor of the Pleas for the said County of Monmouth, who prosecutes for the State of New Jersey aforesaid, in that behalf, as the said Albert C. Twining and David C. Cornell have put themselves upon the said jury, and the same day is given to the parties aforesaid, at the same place, at which time, that is to say, on the first day of March, nineteen hundred and four, being as yet of the term of January aforesaid, before the judge aforesaid, here cometh as well the said John E. Foster, Prosecutor of the Pleas aforesaid, who prosecutes as aforesaid, as the said Albert C. Twining and David C. Cornell, being brought to the bar here in their proper persons by the said Sheriff of the county aforesaid, and the jurors of the said jury by the Sheriff of the county aforesaid for this purpose are empanelled and returned, that is to say,

1. John L. Ely.
2. James Riley.
3. Elijah H. Matthews.
4. Isaac Smith.
5. Cyrenius Aumack.
6. Howard Dilentash.
7. Abram Huyler.
8. John Reddington.
9. William H. Lloyd.
10. William H. Coward.
11. James F. Hutchinson.
12. William Beihl.

15 being called come, who being chosen, tried and sworn to speak the truth of and concerning the premises, and thereupon the trial of the said issue commenced before the said court and jury, and the evidence being closed and counsel heard, the said issue after a charge of the court, was submitted to the said jury, and the said jury in the charge of the officer of said court, duly sworn for that purpose, were taken to a private room to consider of their verdict, and afterwards, at Freehold aforesaid, the said jury returned into and before said court in charge of the officer sworn to keep them in charge, and then and there in the presence of the said Albert C. Twining and David C. Cornell, and of the said John E. Foster, Prosecutor of the Pleas, say on being asked in due form, that they have agreed upon their verdict, and by their foreman further say that they find the defendants guilty as they stand charged in the within indictment.

Whereupon it is ordered that the verdict and proceedings be entered and recorded.

And thereupon the said Albert C. Twining and David C. Cornell on the third day of May, in the year of our Lord one thousand nine hundred and four, being produced in and before the said court, at Freehold aforesaid.

It is ordered and adjudged by the court that the said Albert C.

Twining be confined in the State's prison for the term of six years at hard labor.

And it is also ordered and adjudged that the said David C. Cornell be confined in the State's prison for the term of four years at hard labor.

Judgment entered and signed this third day of May, A. D., 1904.

16 STATE OF NEW JERSEY, *County of Monmouth, ss:*

I, Joseph McDermott, Clerk of the County of Monmouth and also Clerk of the Court of General Quarter Sessions, do hereby certify that the foregoing transcript is a true copy of the transcript as the same remains on file in my office.

In witness whereof I have hereunto set my hand and official seal this sixth day of May, A. D., 1904.

JOSEPH McDERMOTT, *Clerk.*

17 Quarter Sessions, Monmouth County.

THE STATE, ETC.,
*vs.*
ALBERT C. TWINING and DAVID C. CORNELL.

Before Hon. Wilbur A. Heisley, Judge.

FREEHOLD, N. J., *March* 1, 1904.

Appearances.

John E. Foster, Esq., Prosecutor, for the State.

W. T. Hoffman, Eusebius W. Arrowsmith, Sr., for Defendant, Twining.

John F. Hawkins, Esq., for Defendant, Cornell.

Mr. ARROWSMITH: May it please the Court, before a Jury is empanelled in this case, I desire to ask leave to withdraw the pleas of not guilty entered for the defendants, for the purpose of making a motion.

Motion granted.

Mr. ARROWSMITH: This indictment, if your Honor please, is found under the 17th Section of the Act entitled an Act Con-
18 cerning Trust Companies, revision of 1899, found in pamphlet laws of 1899 on page 450, and the indictment charges a violation of the 17th section of that statute which reads as follows:

"Every director, officer, agent or clerk of any Trust Company who wilfully and knowingly subscribes or makes any false statements of facts, or false entries in the books of such trust company, or knowingly subscribes or exhibits any false paper with intent to deceive any person authorized to examine as to the condition of such Trust Company, or wilfully or knowingly subscribes to or makes any false report, shall be guilty of a high misdemeanor and punished accordingly."

The first objection which I make to the indictment is very formal; it is a matter in which your Honor, sitting here at trial, will not pass upon, but I make it for the purpose of saving my rights at any future time. It is the constitutional question. I claim that the section is in contravention of Article 4, Section 7, Paragraph 4 of the Constitution of this state, which reads:

"To avoid improper influence which may result from intermixing in one and the same act such things as have no proper relation to each other, every law shall embrace but one object and that shall be expressed in the title.

This offense is not found in the Criminal Procedure Act or the Act Concerning Criminal Law, but is under the title of the Act Concerning Trust Companies, and I say that the title of the Act has no relation to the commission of the offense charged in this indictment.

I further desire to press upon your Honor's attention some objections to this indictment which, it seems to me, your Honor should carefully consider and pass upon their merits.

The indictment charges,—but I think I had better read the indictment, if your Honor please, so that you may see precisely the points that I make.

(Counsel reads the indictment.)

The first objection that I have to this indictment is that it is bad for duplicity. It charges two separate and independent offenses in the same indictment, and in one count of the indictment.

19 The charge in this case is of the embezzlement of the sum of thirty thousand dollars of the funds of the association, in distinct terms, as plainly and as explicitly as a charge of embezzlement, misappropriation and misapplication of funds can be made.

And in the same indictment with it, it charges not only misapplication of funds for the purpose of covering up and deceiving, but it also charges that there was a certain false paper exhibited to Larue Vreedenburg. I shall not amplify upon that. It is not necessary to take time to amplify upon it, because if it is a fact that the two crimes are charged in the one indictment, in the same count in the indictment, it is bad for duplicity. The authorities are abundant upon that point, and it is plain, upon principle that that must be so.

The second point I make as to this indictment is that it is bad because two defendants have been joined for the violation of this statute, and I submit that an indictment can be found only against each one for the act of each one; that that statute does not contemplate a joint indictment for two or more defendants exhibiting a false paper.

I shall not amplify upon that.

The next point that I make is that the indictment is uncertain as to who intended to be deceived in many of its characteristics. The statute says that this paper must be exhibited with intent to deceive any person authorized to examine and the indictment has charged as to many of the acts, an intention to deceive in the language of the statute, instead of alleging that some person duly authorized to examine the bank, that this paper was exhibited to such a person and with intent to deceive such a person, the charge is that it was in-

tended to deceive any person, and again, following that, such person and such person. That would certainly be bad if it is not cured by this one allegation. Your Honor will find that all the way through, it says, first, intending to deceive any person authorized to examine as to the condition of such trust company. Of course that does not apprise us as to who "And to conceal from such person." That is any person by implication, "And intending to deceive such
20 person." That is any person. "Making them believe that they had purchased the stock for the benefit of the bank, and making him believe that such purchase of stock was authorized by the resolutions," etc. Then it goes on to say that the said Twining and Cornell on the 14th day of February in the year aforesaid, in the city of Asbury Park, in the county aforesaid, and within the jurisdiction of this Court, they being director, etc., with intent to deceive as aforesaid Larue Vreedenburg, he being a person authorized to examine as to the condition of the Company, did knowingly present, exhibit and show, etc.

The aforesaid, referred to there, is any person authorized.

The COURT: Mr. Arrowsmith, why is not the indictment consistent with the theory that at the time of the making of this false entry defendants did not know to whom they would exhibit it, expecting that they would exhibit it to a person who had the authority to examine the condition of the bank. That they did not at that time have specific knowledge as to the identity of that person, and that they made it with the intent to deceive him, whoever he might be. That after, when it came time to present it, that then they did present it to a specific person.

Mr. ARROWSMITH: The intention must be at the time of the exhibition. I am going to amplify that point on another point in the case, or, I will answer it very fully when I reach that point in the case.

The next point I make is that the indictment does not show by proper allegations that the person to whom the paper was exhibited was authorized to examine as to the condition of the bank.

It is a familiar rule of pleading that you cannot allege in an indictment a conclusion. You must allege a fact upon which the conclusion can be drawn, upon the face of the paper. Now, this says that this paper was exhibited to Larue Vreedenburg, a person authorized to examine as to the condition of the bank.

That is a conclusion from certain facts. If the true facts were set forth in this case it might show upon its face that Larue Vreedenburg was not entitled to examine as to the condition of the
21 bank, and therefore it is a necessary allegation in this case to show the authority that Larue Vreedenburg had to examine as to the condition of the bank and it must be set forth in terms in the indictment.

The COURT: If that is so, you would have to show how these defendants were elected officers and directors. Why would not that same process of reasoning apply in both cases?

Mr. ARROWSMITH: I think that is very different. There the defendants themselves, charged as officers, how they were elected is of

no consequence whatever. If they were there acting in that capacity. That is all it is necessary to show as against them. They are not elected, not appointed at all. That is, they are not under the law. That is a matter for the corporation itself, the board of directors, to select out of their number, or outside their number, any one whom they choose to act as certain officers, and agents referred to in this indictment.

The other point that I make against this indictment is, this indictment is found under the seventeenth section of an act concerning trust companies which was passed in 1899, P. L. p. 450. It is only for a violation of that statute that this indictment can be framed. It is for a violation of that statute prior to that time, prior to 1899, it was not a crime at all, to do this thing anywhere in the State of New Jersey, the very thing that is alleged in this indictment in reference to these false minutes, was not a crime under the law in the State of New Jersey prior to 1899. It was created a crime by act of 1899, under the act concerning trust companies, the formation of trust companies; under that act and by virtue of that act. They have not alleged in this indictment that this is a trust company created under that act. In fact it is not, we all know that it was not created at all under that act, and this statute was made and can only apply to trust companies created under that act.

Now the indictment shows in this case that this was not a corporation created under the Trust Company Act. It was a corporation known as the Monmouth Safe Deposit and Trust Company, a corporation created under an entirely different act, having no
22 relation whatever to the act concerning trust companies, and under which there is no prohibition anywhere within the limits of the State of New Jersey making it a crime for charging what they have charged in this indictment, and I say that in this respect this indictment is fatal and cannot be cured, and there is no way in which an indictment can be framed under the facts in this case applying to these defendants being officers of the Monmouth Safe Deposit and Trust Company, a corporation created under an entirely separate act, and having no relation to the act under which this indictment is found.

If your Honor please, for those reasons I very earnestly insist that this indictment should be quashed.

Mr. HAWKINS: The distinction in the law is manifest. Under the act of 1899 this Company was originally organized as the Monmouth Trust and Safe Deposit Company. The law recognized at that time and has recognized ever since, a distinction between a trust Company and a deposit company.

Your Honor will see by looking at the Trust Company act which you have before you that it applies to trust companies only, and you will find that immediately succeeding that act, in the same book, there is an act applying to safe deposit companies. Showing that the legislature of the State of New Jersey at the time of the enactment of the original act under which this corporation was organized, had in its mind a conception of the performance of two duties, the duty of acting as a trust company, and the duty of acting as a safe

deposit company. In the revision which the legislature made of this law which combined the two companies together, it separated the duties of a trust company from the duties of a safe deposit company and it made the duties of a trust company independent, in an act by itself. I say to your Honor that that seems to me to be a mathematical demonstration of the original intention of the legislature to delegate to the trust company and deposit company powers which a trust company did not have.

In other words, that it was forming a different kind of corporation. It was not forming a trust company corporation, but it
23 was forming a trust company and safe deposit corporation, and that is the act under which this company was instituted.

Now, your Honor will not find in the act under which the Company was originally instituted, any penalty for the offense which is here charged. How, then can your Honor say that under an act relative to trust companies you can prosecute the officers of a trust company and a safe deposit company, when the law which your Honor has before you shows that there is a recognized distinction made by the legislature in these two institutions?

I think that is all I wish to say on the subject. Mr. Arrowsmith has covered that point and all the others in fact, but I wanted to amplify it.

The COURT: There is no doubt that the legislature has regarded these two corporations as entirely separate and distinct. The title of the two acts, one found at page 150 of the laws of 1899 and the other found on page 468 of the laws of the same year, show that. And the point is accentuated by the concluding paragraph of the fourth section of the act found on page 470 referring to safe deposit companies which say that no safe deposit company shall have the power to transact the business of a bank or a trust company.

Mr. FOSTER: I think your Honor will find under the trust company act of 1899 where a trust company is given power to transact business as a safe deposit company, however.

The COURT: That may be, I don't know how that is.

But the indictment shows the name of this company to be the Monmouth Trust and Safe Deposit Company and yet throughout the indictment it characterizes the company as really a trust company.

Mr. ARROWSMITH: The point I desi*de* to make upon the face of the indictment, which might not appear without the fact except the point I make is it is necessary and a necessary allegation in the indictment to say that it was a trust company organized under the laws of 1899. There were trust companies organized and were organized that are not now governed by the laws — 1899, many of them do not require a certificate from the commissioner of banking and insurance.

24 Mr. HAWKINS: The Lakewood Trust Company is on- not under this act. It would have to have a capital of a hundred thousand dollars and the Lakewood Trust Company only has fifty thousand dollars. There are numbers of others, but I refer to the Lakewood Company because your Honor knows it.

The COURT: It would appear under the safe deposit company act that this indictment could not be sustained. It must appear by the indictment and by the proof, of course, that it is a trust company organized under the trust company act or some other act authorizing the creation of a trust Company.

The motion to quash is denied.

The defendants except. Exception allowed defendants, signed and sealed accordingly.

Mr. ARROWSMITH: Both defendants renew the plea of not guilty.

(A Jury being thereupon drawn and found satisfactory, they were sworn.)

(The prosecutor then opens to the Jury.)

The PROSECUTOR: There are some formal matters of proof, I don't know whether we can expedite the trial by any means, but I will offer now a certified copy of the certificate of incorporation of the Monmouth Trust and Safe Deposit Company, which is made evidential under the provision of the third section of the Trust Company Act.

Mr. HAWKINS: Before any testimony is offered, if your Honor please, I would like to call the attention of the Court to a point that was raised by Mr. Arrowsmith which is that two crimes are charged in this indictment and in one count, and I now call upon the prosecutor, through the Court, to elect which of the crimes the defendants are to be tried for, the one crime alleges that they intentionally and fraudulently took the sum of thirty thousand dollars and the other crime charges that they exhibited a false paper. I insist as a matter of law under this indictment as it is framed that the prosecutor can go to trial charging us with either of these things he wishes and I contend that we have a right now to know, inasmuch as there is duplicity in this indictment and inasmuch as there are two charges as distinct as they possibly can be, alleged in the indictment, that the prosecutor inform us now which of the charges he proposes to establish.

The PROSECUTOR: I was going to say before Mr. Hawkins' suggestion, that I shall claim to the jury that this was a violation of the seventeenth section of the Trust Company Act in exhibiting a false paper to a person authorized by law to examine the institution.

Mr. HAWKINS: Then I would like to know, whether before going on, the portion of the indictment relative to the fraudulent and willful and intentional taking of thirty thousand dollars is to be eliminated from the case.

The PROSECUTOR: No, it is not.

The COURT: I suppose that is simply a recital of the fact and as an inducement for the alleged presentation of an alleged false paper.

The PROSECUTOR: That is not a separate count in the indictment. An examination of it will show that it is not a count.

Mr. HAWKINS: My objection is that there are two crimes charged in the one count, that is my objection.

Mr. ARROWSMITH: We take our exception as to the matter as the proof is offered I think.

Mr. HAWKINS: We want an exception if the Court does not rule as to which portion of the indictment he shall proceed under.

The COURT: I rule that the first portion of the indictment is a mere recital of a part of the facts which the defendants brought about to misrepresent to the person authorized to examine the company by presenting the paper which in the indictment is alleged to have been a false minute. That it is competent to show if the state can, the misapplication of funds as specified in the indictment, simply for the purpose of following it up then with proof showing that they tried to deceive the banking department, or the person
26 appointed to examine the company by the use of an alleged false minute. That it is not a separate and distinct crime under this section.

Mr. HAWKINS: The Court will allow us an exception?

The COURT: Yes, sir.

(Exceptions allowed defendants, signed and sealed accordingly.)

Mr. ARROWSMITH: The exception in this case will go without——

The COURT: All exceptions will be for the benefit of both defendants, whether specially stated or not.

Mr. ARROWSMITH: Let that appear on the record.

The PROSECUTOR: I now offer in evidence the certificate of incorporation, a certified copy of it.

The COURT: Is there any objection to this certificate?

Mr. ARROWSMITH: No, sir.

Admitted and marked "State's Exhibit No. 1" of this date.

Mr. ARROWSMITH: This was a corporation organized under the general corporation law, wasn't it?

The COURT: Is there any objection to the paper?

Mr. ARROWSMITH: Oh no, we want the paper in.

R. A. TUSTING sworn as a witness on behalf of the State testifies as follows:

Direct examination by the PROSECUTOR:

Q. You reside in Asbury Park?

A. I do.

Q. Were you connected in any way with the Monmouth Trust and Safe Deposit Company while it was in existence?

A. I was.

Q. In what way?

A. As a director.

Q. Did you hold any other office?

A. Secretary.

Q. Were you a director and Secretary during the years 1902 and 1903 up to the close?

A. Up to the close of the institution, yes, sir.

Q. In February, 1903?

A. Yes, sir.

Q. Who were the other officers and directors of the institution?

27 The COURT: When?

The PROSECUTOR: During that time, 1902 to 1903?

A. At the time the institution closed A. C. Twining was President, D. C. Cornell, Treasurer.

Q. These two defendants?

A. Yes, sir.

Q. Were they also directors?

A. They were.

Q. Who were the other directors, can you recall?

A. S. A. Patterson, Col. Harvey, George B. Harvey, Harry R. Smith, George F. Kroehl, William Harrison of Lakewood. Do you wish them all.

Q. As many as you can recall?

A. I suppose I can recall them all. I think White of New York.

Q. During the year 1902, and up to the close of the institution in February, 1903, was the company engaged in business in Asbury Park?

A. It was.

Q. Transacting its ordinary business?

Mr. ARROWSMITH: Objected to as calling for a conclusion.

The COURT: Ordinary business; I don't know whether that means banking business or trust company business.

The PROSECUTOR: Whatever its business was, whatever it was, if it continued to do it.

The COURT: Leave out the word "ordinary."

Q. And it was transacting its ordinary business during that period?

A. It was.

Q. Do you know whether during that same period the defendants, Twining and Cornell, as the President and Treasurer, participated in the active management of the company?

A. They did.

Q. As Secretary of the Corporation what were your duties?

A. To keep a record of the minutes, or attest them rather.

Q. Minutes of the Company's meetings?

—. Yes, sir.

Q. Did you have any minutes to keep?

A. While I was on the executive Committee I had the executive committee minutes to sign.

Q. I show you a book, is that the minutes book of the Corporation?

A. Yes, sir.

Mr. FOSTER: I offer it in evidence.

28 Marked and admitted "State's Exhibit 2" of this date.

Q. Did you keep any other record of the proceedings of the Board of Directors and of the executive committee, except what is in this book?

A. Well, that is the minute book of the executive committee, I think.

Q. Have you got the executive committee book there, is this it?

Mr. ARROWSMITH: I object to that question and to all questions relating to any book of minutes of the executive Committee. There is no allegation in this indictment in reference to any false minutes of the executive committee of the Board of Directors. The allegation is that it was a paper purporting to be a minute of the Board of Directors themselves.

The PROSECUTOR: That is right. I shall not press this. I think you are right. That is all for the present.

The COURT: Are you through with him entirely.

The PROSECUTOR: I don't want to go into the question of his attendance at the meetings. When it comes in its proper order I shall go into that. That is all now.

Cross-examination by Mr. ARROWSMITH:

Q. I understood you to say that during the year 1902 and up to the time the institution was closed, you were secretary of the company?

A. You misunderstood me, I said up to the time of its closing; I could not tell you how far back I was, I was during that year.

Q. That is what I asked?

A. During 1903.

Q. During the year 1903?

A. I don't know how far back I was Secretary, but I think the year prior, I could tell by looking at the book, of course.

Q. Just look at it and see?

A. (Examining book.) The first meeting to which I see my signature is dated June 11th, 1900, so that it goes further back than I thought. (Examining.) That is the first.

Q. Did you transcribe the records of the proceedings of the directors in the minute book in your own handwriting?

A. I did not.

Q. They were transcribed by somebody else and attested
29 by you, or your name signed to them afterwards?

A. Do you wish me to give the *modus operandi*, or a direct answer to your question.

Q. I want you to answer my question. I am going to try to get the *modus operandi*.

The PROSECUTOR: I have no objection to his telling it now if you want.

Mr. ARROWSMITH: I prefer to get at it in my own way.

Q. I ask you if it is not the fact that you merely signed your name to them?

A. After they were written in the minute book.

Q. Now I will see if I understand——

The COURT: What is the answer?

The WITNESS: After they were written in the minute book, that is the minutes that I attended.

The COURT: What do you mean by the minutes which you attended?

The WITNESS: The meetings, the minutes of the meetings which I attended.

Q. Is it not a fact that the record of the meetings of the Board of Directors were first entered upon a slip of paper and then next regular meetings read and approved before entering in the minutes?

A. No sir, I think not.

Q. Do you say that they were entered in the minutes before they were approved?

A. The minutes of the preceding meetings were not approved except by myself. When I signed the minutes I knew whether the minutes were correct or not, when I did not sign them, as you will see by the omission of my signature. When I signed the minutes it meant that I knew those minutes were correct and that I attended it.

Q. But at each meeting would not the minutes of the last meeting be read from a paper and approved, and then didn't you enter them?

A. No, sir, I think not.

Q. Weren't they read and approved at each meeting?

A. From the minute book, never from any slip of paper; no sir.

Q. Take the record of the meetings you kept at the time a record of what was done as Secretary, that is at the meetings that you attended?

A. Yes sir.

Q. And what did you keep that on? Did you enter it right in the book?

A. I cannot answer you without misinforming you, if you will allow me to tell you.

Q. Well, you can tell me?

A. The minutes as I remember, as a rule, were kept by Mr. Cornell, that is he took the minutes of the meeting and Miss Rittenhouse transcribed them in the book for me to attest, but they were never read at subsequent meetings from a slip of paper. In other words, these minutes were always supposed to be in this book before another meeting was held, and supposed to be attended to directly or in a very short time afterwards. We have Miss Rittenhouse here and how long she usually did it she can tell you herself.

Q. Don't you know as a fact, before they were actually entered in the minute book, the minutes of the preceding meeting were read and approved, before they were entered in the book?

A. No, sir; I don't know any such thing.

Q. Would you say the contrary is the fact?

A. I think it is. Yes sir. I know it is as a rule.

Q. Do you remember about it?

A. I remember that what you state is not true.

LARUE R. VREEDENBURG, sworn as a witness on behalf of the state, testifies as follows:

Direct examination by the PROSECUTOR:

Q. Where do you live?

A. At Somerville, in this State.

Q. Are you employed or connected with any of the Departments of the State?

Mr. ARROWSMITH: Objected to as immaterial.
Objection overruled; Defendants except.
(Exception allowed defendants, signed and sealed accordingly.)

A. I am.
Q. What one and in what capacity?

Mr. HAWKINS: We object because there is a better way
31 to prove it. He received an appointment if he has a right to discharge the duties of the office, and that appointment is the best evidence, and I insist, the only evidence that can be offered before the Court.

The PROSECUTOR: There is nothing requiring him to have an appointment, nor a certificate of his appointment; nor is there anything requiring him to present one.

The COURT: You mean by the statute?

The PROSECUTOR: Yes sir.

Objection overruled; defendants except.
(Exception allowed defendants, signed and sealed accordingly.)

A. With the Department of Banking and Insurance, of which I was an examiner authorized to examine——

Mr. ARROWSMITH: That is objected to "Authorizing, etc."

The COURT: Yes, unless he can show.

The WITNESS: Authorized to examine all the institutions under the supervision of the Department. I was only going to state which I was authorized to examine.

Mr. ARROWSMITH: The point I make is, if this man is authorized by law to examine it must be by virtue of the statute, some statute. They are attempting now to hold us for, and the indictment charges that a paper was exhibited to a person authorized by law, that is by the statute of New Jersey. It seems now, I submit, that there must be some statute and some appointment in virtue of that statute.

The COURT: Where is there a statute authorizing anybody?

Mr. ARROWSMITH: There is but not this man, only the Commissioner of Banking and Insurance.

The PROSECUTOR: Who was authorized to appoint examiners. The act in relation to the banking department gives the Commissioner power to appoint examiners.

Mr. ARROWSMITH: Where is that?

The PROSECUTOR: Do you want me to stop and hunt it up for you?

Mr. HAWKINS: Is there any authority in the act relating
32 to banking which authorizes an examiner to examine trust companies not organized under the banking act?

The PROSECUTOR: Your Honor will find in the general statute on page 137 an act to establish a Department of Banking and Insurance. Then you will find under the title of Trust and Safe Deposit Companies under that act, page 3257, Section 42 of the General Statutes, where the Commissioner is authorized, shall have authority himself

or such person or persons as he may designate to examine the affairs of any such corporation whenever he may deem it expedient.

Mr. ARROWSMITH: That is speaking of a bank?

Mr. FOSTER: That relates to trust and safe deposit companies, that is the title, "By such person or persons as they may designate to examine the affairs of any such corporation whenever they may deem it expedient."

The COURT: Does it refer to a trust company?

The PROSECUTOR: I find something which I have omitted here. Mr. Vreedenburg called my attention to the language in the Trust Company Act of 1899, which provides that a trust company shall be subject to inspection and supervision by the commissioner of banking and insurance, and it shall be the duty of such commissioner or some person or persons appointed by him. That is a statute that I had overlooked.

The COURT: Very well, he may answer.

(Question and answer read as follows.)

"Q. Are you employed or connected with any of the departments of the State? A. I am."

"Q. What one and in what capacity? A. With the Department of Banking and Insurance, of which I was an examiner authorized to examine Savings Banks, State Banks, and Trust Companies."

Mr. ARROWSMITH: Was that in writing or verbal?

The PROSECUTOR: I object to this. I don't think he ought to be cross-examined now.

Mr. ARROWSMITH: I submit if it is in writing this witness cannot verbally state his authority.

The COURT: He cannot state the contents of a written authority, but I do not understand it is necessary for the state to prove
33 he had the authority if he was acting as an examiner with the knowledge of the commissioner of banking and insurance, that is all sufficient.

Mr. ARROWSMITH: If your Honor will only hold that and stick to it I shall be very glad.

The COURT: I shall stick to it.

Mr. ARROWSMITH: If that is so, I misconceive the law entirely. The statute provides and the indictment charges that it was made to a person authorized to examine. Both the statute requires it and the indictment alleges it, and you cannot get rid of the language of that statute or the language of that indictment by showing that the man did it and exercised the authority.

Q. You were again interrupted in your answer?

A. I was about to say that I had a written authority which is no longer in existence, the one under which I operated at that time lapsed upon the expiration of the term of office of the commissioner, Mr. William Battle. There was a new commissioner appointed last spring, the old commissioner is no longer in existence, and I hold a new one now, since then from Mr. Watkins.

Q. The present commissioner?

A. The present Commissioner; yes, sir.

Mr. ARROWSMITH: I object to the question and the answer I submit he cannot prove that Mr. Watkins was commissioner in that way.

Mr. FOSTER: I don't care whether he was or not. It is after our time anyway.

Objection overruled; Defendants except.

(Exception allowed defendants, signed and sealed accordingly.)

Q. At the time in January and February, 1903, were you connected with the department in the capacity you have indicated?

A. I was and had been for several years prior to that.

Q. Were you exercising the authority you say you possessed at that time in the examination of savings banks, trust companies, etc., that you have named?

Mr. ARROWSMITH: Objected to.

34 Objection overruled; Defendants except.

(Exception allowed defendants, signed and sealed accordingly.)

A. Yes sir.

Q. In the month of February, 1903, did you, in your official capacity, have anything to do with examin-g the affairs of the Monmouth Trust and Safe Deposit Company at Asbury Park?

Mr. ARROWSMITH: I desire to take an exception to all this because the preliminary fact has not been established and I want to take it as we go along.

The COURT: Yes.

A. I was especially directed over the telephone to come to Asbury Park and look into the affairs of the Trust Company and——

Q. Did you go to the Monmouth Trust and Safe Deposit Company then in February, 1903, to make an examination as to the condition of its affairs, in your official capacity?

A. I did, on February 14th.

The COURT: Why don't you show who directed him to go there over the 'phone, show it was with the knowledge of his superior officer.

Q. Who gave you that instruction over the telephone that you refer to?

A. Mr. Thomas K. Johnston, who was at that time the acting commissioner, Mr. Battle being in impaired health and the work of the office was conducted by Mr. Thomas K. Johnston, who had been deputy and who was then acting as deputy and acting commissioner.

Q. Commissioner of what?

—. Of Banking and Insurance.

The COURT: How do you know that?

The WITNESS: I know it from the signature to papers that I have received, instructions, the various documents I saw at the department.

Q. What department?

A. Our department, bearing such signature, and I was authorized to address my reports to Thomas K. Johnston, acting commissioner.

The COURT: Who authorized you to do that?

35 The WITNESS: The deputy commissioner; deputy and acting commissioner.

The COURT: Johnston himself, do you mean.

The WITNESS: Yes sir.

The COURT: Did he have an office?

The WITNESS: The act provides for a deputy commissioner and Mr. Battle was in impaired health and all the work of the office was transacted by Mr. Johnston, the reports were sent to him.

Q. Where was the office?

A. In the State House.

Q. At Trenton?

A. At Trenton.

Q. In whose charge was it?

A. Mr. Johnston's.

The COURT: In Mr. Battle's or Mr. Johnston's personally?

The WITNESS: Both of them.

The COURT: Have you ever seen them together in the office there?

The WITNESS: Yes, I have had consultations with both of them in their respective capacities.

Q. When did you say you arrived at Asbury Park to examine the affairs of this company?

A. On the morning of February 14th, 1903.

Q. Did you see the defendants there when you arrived?

A. Yes sir, both of them.

Q. Won't you state what you did in the performance of your duties on your arrival?

A. I began to prove the cash first.

Q. Let me ask you, was the company doing business at that time?

A. I think not. The doors were closed. Persons could only gain admittance through the rear entrance.

Q. When had the doors been closed?

A. I found them closed when I came.

Q. Do you know why they were closed or by whose order?

A. There was a notice on the door that they were closed temporarily.

Q. Then you started in now to tell us what you did on the morning of the 14th of February.

The COURT: Is that necessary?

The PROSECUTOR: I don't want to go into too much of this.

36 The COURT: It seems to me that it is hardly necessary to show all he did in the way of proving the cash and the rest.

The WITNESS: I can shorten that.

Mr. ARROWSMITH: I am going to object to it because it is not relevant to this issue at all.

Q. Did you proceed to make an examination of the affairs of the Company?

A. I did.

Q. In the course of your examination did you come across a book called Cash Book No. 8, of the Monmouth Trust and Safe Deposit Company?

A. I did.

Q. Is this the book?

A. It is.

The PROSECUTOR: I will have this book marked for identification.

The said book is marked "State's Exhibit No. 3" for ident. of this date.

Q. Did you find anything in that book showing the last entry of business transacted by the company and the date when it was done?

A. Yes, I looked over the——

Mr. ARROWSMITH: Objected to as irrelevant.

Objection sustained.

Q. Was your attention directed in any way to the entries on pages 110 and 111 of this exhibit?

Mr. HAWKINS: Objected to on the ground that it is not shown who he was directed by.

Objection overruled; Defendants except.

(Exception allowed defendants, signed and sealed accordingly.)

Mr. ARROWSMITH: I make the further objection, if your Honor please that it has no relation whatever to the allegation of the exhibition of a false paper by these defendants or either of them, purporting to show a meeting of the Board of Directors and a resolution authorizing the purchase of stock. That is all that we are charged with in this indictment under this statute, and all that we can be charged with in this indictment; now, whether anything else had been done which was irregular, or whether this was done to cover something else, might only prejudice these defendants without having any relation to the issue in the action. You cannot prove these defendants guilty of this offense by showing that they may have done something which is irregular in another transaction.

37

Objection overruled; Defendants except.

(Exception allowed defendants, signed and sealed accordingly.)

A. Yes sir.

Q. Who called your attention to that, if you remember, to pages, 110 and 111?

A. No one; I found that among the assets.

Mr. ARROWSMITH: He has answered the question and I insist that no testimony shall be volunteered until we have an opportunity to object to the question

Q. Where did you find that book on February 14th or the time you say you examined it?

A. In the counting room on the desk where the bookkeeping was being conducted.

Q. Did you call the attention of either or both the defendants to the entries on pages 110 and 111 of that book?

Mr. ARROWSMITH: Objected to on the ground that it is irrelevant and in no way connected with the issue framed by this indictment.

Objection overruled; Defendants except.

(Exception allowed defendants, signed and sealed accordingly.)

A. To some of the entries.

Q. Which entries did you call their attention to?

Mr. ARROWSMITH: And whom?

The PROSECUTOR: And which one of the defendant's attention did you direct to those items?

A. In the course of that day, February 14th, which was a Saturday, and the following business day, Monday, the 16th, the attention of both defendants, or rather questions were asked of both defendants with regard to a credit and a debit there——

Q. What credit and what debit did you ask the questions about?

Mr. ARROWSMITH: I submit, if your Honor please, that
38 they should show what was said as to each time and whether they were both present?

The PROSECUTOR: I expect to do it. I am asking now what credit and what debit? Put Mr. Twining's case first then, did you call the attention of Mr. Twining to this and what credit and what debit on those pages?

Mr. HAWKINS: I desire to object to that as against Cornell. I hold that the evidence, if it is prejudicial to Mr. Twining is liable to injure Mr. Cornell and he does not seem to be identified with it at all.

The COURT: Was anybody present when you had your conversation with Twining about it, as you say?

The WITNESS: Yes.

The COURT: Who?

The WITNESS: Miss Rittenhouse and Mr. McMurtrie.

The COURT: What about Mr. Cornell, was he present or not?

The WITNESS: He was present; yes, he was present.

Mr. ARROWSMITH: I insist that the question should be answered "Yes" or "No" and not by an explanation.

The WITNESS: He was not present through the whole of it, but he was present during the greater part of it.

The COURT: Was he present at the time you were about to refer to, showing Twining these entries?

Mr. HAWKINS: I don't understand he has said anything of the kind.

Mr. ARROWSMITH: He said he asked Twining some questions in reference to the entries.

The COURT: Well, was he present at the time you and Mr. Twining had any conversation about any entries on either of those pages?

The WITNESS: He was not present when we began; he came in before the discussion was complete.

The COURT: It is admitted as far as Twining is concerned and not as against Cornell unless it appears it was all in the presence of Cornell.

Q. Won't you state just what was said by yourself and Mr. Twining in regard to those entries?

A. I don't want it understood that I called their attention to the entry on the book by pointing to it, or anything of that kind; we discussed the entry.

39 Q. Just state what you did?

A. We discussed the charge and we discussed the credit.

Q. State what was done and said then in regard to those entries.

Mr. ARROWSMITH: Objected to as irrelevant to the issue.

Objection overruled; Defendant except.

(Exception allowed defendants, signed and sealed accordingly.)

A. In point of time, Mr. Cornell was first asked about this, about the purchase of the——

Mr. HAWKINS: May I inquire, if your Honor please, if Twining was present at that time?

The WITNESS: Mr. Twining was in the next room.

The COURT: Admitted simply as against Cornell.

The WITNESS: The entry is——

Mr. HAWKINS: One moment. If the Court please, I don't want to seem to be persistent in my objections, but of course, it is my legal duty to make such objections as I think are proper, and I don't think there is a question for this answer, and I have not got anything to object to. But what he is now about to state I would like a question put to.

The COURT: Ask a new question.

Q. What was done and said between yourself and Mr. Twining, or yourself and Mr. Cornell, in relation to those two entries, or those entries of debit and credit on pages 110 and 111, which you spoke of?

Mr. HAWKINS: I object to that question because it is confusing, it is mingling the testimony in regard to the two defendants together.

The PROSECUTOR: I withdraw the question.

Q. State what was done and said between yourself and Mr. David C. Cornell in relation to the items of debit or credit appearing on pages 110 and 111, which you discussed between you?

Mr. ARROWSMITH: Objected to.

The COURT: It is admitted simply as against Cornell and not as against Twining.

40 Mr. ARROWSMITH: I take an exception to its being allowed at all on the ground that it would naturally prejudice Twining.

Mr. HAWKINS: I make the same objection for Cornell.

Objection overruled; Defendants except.

(Exceptions allowed defendants, signed and sealed accordingly.)

A. In the proving of the assets I found——

Mr. ARROWSMITH: I object to that. That is not an answer to the question at all.

The COURT: That is not responsible.

The WITNESS: I am not pursuing that.

The COURT: What did Mr. Cornell say, that is the point?

The WITNESS: I found at this time——

Mr. ARROWSMITH: I object to what he found.

The COURT: What did he say?

Q. What did you say and what did he say?

A. I asked Mr. Cornell for——

Mr. HAWKINS: That is a new question and I desire to made the same objection as I did formerly.

Objection overruled; Defendants except.

(Exceptions allowed defendants, signed and sealed accordingly.)

A. I asked Mr. Cornell for an explanation of this debit——

The COURT: On what page?

The WITNESS: On page 111.

Q. What debit are you referring to?

A. This charge to Stock and Bond Account of 381 shares First National Bank of Asbury Park stock, the charge is for $44,875. I asked for an explanation of that charge, and will I give you his phraseology as he explained, that it was a purchase made that date——

Q. What date?

A. The date under which the entry is made.

41 Q. What date is that?

A. February 13th.

Q. 1903?

A. 1903, in pursuance of those inquiries of Mr. Cornell at perhaps two or three times during the day, and also on the Monday following, there were times when I had Miss Rittenhouse take down a memorandum of what he stated so that I should not forget it, and the explanation.

Mr. ARROWSMITH: This is all being given, if your Honor please, without a question.

The COURT: Well, what was done or said, is the question. This is what was done.

Mr. HAWKINS: He is going on to tell what was done with Miss Rittenhouse, and we have had no opportunity to object to that. The question was what was done or said with Mr. Cornell and Mr. Twining, the question now is as to Cornell and he is telling what he did with Miss Rittenhouse.

The COURT: As I understand it, in the presence of Cornell this was?

The WITNESS: That is right. I had Miss Rittenhouse take down what Mr. Cornell said.

The COURT: Stenographically you mean?

The WITNESS: Stenographically. That is what I intended to say. I thought I had.

Q. Well, go on?

A. All that Mr. Cornell said was not taken down, it was only when a reply was such as I wanted to make a record of, then he would have Miss Rittenhouse take it down, on her note book, and his statement was afterwards transcribed by her, and that was on Monday the 16th, late in the afternoon of Monday the 16th, he desired to make a correction in his statement, and for the purpose of making that correction the original paper was surrendered to Mr. Cornell, if he ever had delivered it to me, and a corrected paper delivered to me.

Q. By whom?

A. By Mr. Cornell.

Q. Have you that paper?

A. I think it was handed to me by Mr. Cornell. Possibly it was handed to Mr. McMurtrie—Calvin D. McMurtrie—who was there assisting me and by him to me. I think Mr. Cornell handed it to me himself.

42 Q. Is that in relation to this item which you read?

A. The statement is rather general, covering not only questions relating to this item, but to some other matters also.

Q. Have you the statement?

A. I have.

Q. Let me see it.

A. (producing statement.)

That is the corrected statement, in typewriting, the pencil memoandums are my own.

The PROSECUTOR: That relates to another branch of the case that we have not got to yet.

The WITNESS: There is another one. I think that was written on Saturday, the 14th.

Q. Who gave you that paper?

A. Mr. Cornell.

Mr. HOFFMAN: You say it was corrected on the afternoon of February 16th?

Mr. HAWKINS: May I look at that paper?

The PROSECUTOR: That is on another branch of the case.

Mr. HAWKINS: I understand that, but all the testimony is going in; is that statement related to that particular paper?

The WITNESS: It is on two days. I think that was given to me, a statement, and was not corrected, this one, I can tell you what the change is.

The PROSECUTOR: Let me get this straight now.

Q. I have called your attention and endeavored to find out any statement that Mr. Cornell made at this time to the entries on pages 110 and 111?

A. Yes sir.

Q. What did he say about those entries, if you can recall?

Mr. HOFFMAN: Let me understand. Does this paper which he has been talking about have any reference to this case or not?

The PROSECUTOR: I have not got to that yet. I am going to get to it in a minute.

A. What he said to me had to do with it as incorporated in this statement, and it was that the stock was bought by the Trust Company that day and it was bought in pursuance of authority of the board of directors and I also inquired how it was paid for, which is covered in that, or partially covered in that statement.

Q. Did you discuss any other item? Where is the item
43 that you spoke of, is that on page 110 or 111? The one that you have been testifying about?

Mr. HAWKINS: Objected to as irrelevant and on the same grounds as before mentioned.

The COURT: The witness was starting in to give in a very intelligent manner and we have left that thread, he says that he went there on a certain day and one of the defendants made a statement referring to these entries. He said that afterwards he wanted to correct that statement, and handed him a written correction of it. Now, why is not that written correction identified and offered in evidence?

The PROSECUTOR: The trouble is the witness is anticipating me in his explanation.

The COURT: I would keep him down to it.

The PROSECUTOR: That is what I am trying to do.

Mr. HAWKINS: The whole trouble is that the statement which Mr. Cornell gave to Mr. Vreedenburg does not relate to the items in the book.

The COURT: The witness says he gave him a corrected written statement on Monday, now they ought to follow that up.

The WITNESS: I should explain that the statement was in two parts. This is the first part which no attempt was made to correct.

The statement now produced is marked "State's Exhibit No. 4" of this date.

The WITNESS: There was no attempt made to correct that.

Q. Who gave you exhibit 4?

A. Mr. Cornell.

Q. On Saturday?

A. I think on Saturday.

Q. What does exhibit 4 say in regard to the items?

Mr. HAWKINS: Objected to.

Mr. ARROWSMITH: That paper is objected to as having no relation whatever to this indictment, and of course it is objected to on the part of Twining as not binding upon him.

The PROSECUTOR: It is only marked for identification. I have not offered it.

44 Mr. HOFFMAN: That question called for its contents.

(Question withdrawn.)

Q. Go ahead and state what else was done and said between you and Mr. Cornell?

The COURT: There was another paper that he has not described yet.

The PROSECUTOR: It has got into the minutes and I have not

gone to those items and I am trying to get this in in its chronological order if I can.

A. I inquired how this was paid for and I was told by Mr. Cornell that this credit to the North American Trust Company on page 110 of $35,048.77 had something to do with it.

Q. Had something to do with what?

A. Something to do with the payment for this stock. Mr. Cornell's explanation was not at all——

Mr. HAWKINS: I would like to ask your honor, so that I will not be continually interrupting the orderly proceeding of the trial, if I can have an objection and an exception to all questions that relate to the entries in those books.

Mr. ARROWSMITH: I thought I made that arrangement.

The COURT: I think so, certainly.

Mr. ARROWSMITH: And the Court said I could take it without making the objection.

The COURT: Yes sir.

The WITNESS: Mr. Cornell's explanation was not very full and he disclaimed complete knowledge——

Mr. HAWKINS: I object.

Objection sustained.

Q. What did he say?

A. Well, that was all I think he gave in explanation, and I think that was all that was said in explanation by Mr. Cornell on——

Mr. ARROWSMITH: That is an answer to that question.

Q. What was done or said, if anything, between yourself and Mr. Twining in regard to the entries on those two pages?

Mr. HAWKINS: When?

The PROSECUTOR: At the time he was there or subsequent.

45 Mr. ARROWSMITH: I would like to know when?

The PROSECUTOR: On February 14th, he said. Is that right?

The WITNESS: The 14th is when I was there first.

Q. Was there any conversation between Mr. Twining and yourself on the 14th of February in regard to this case?

Mr. HAWKINS: I object to that as prejudicial to Mr. Cornell.

Mr. ARROWSMITH: I object to it as incompetent, having no relation to the issue and also upon the ground that it already appears that this conversation was after the bank had closed and ceased to do business with the public.

The COURT: It is admitted only as against Twining and Mr. Arrowswith's objection is overruled.

Defendants except.

(Exception allowed defendants, signed and sealed accordingly.)

A. Whatever conversation there was with Mr. Twining on the 14th was very brief. On the 16th, late in the afternoon——

Mr. ARROWSMITH: I make the same objection to the 16th as the other.

The COURT: Yes, it is all subject to the same objection and the same exception.

(Exception allowed defendants, signed and sealed accordingly.)

The WITNESS: In the afternoon of the 16th, probably as late as three o'clock, or later, the matter was taken up with Mr. Twining and he was asked generally about this matter of the purchase of the First National Bank stock and Miss Rittenhouse, his stenographer, was present, and at my request some portions of what Mr. Twining said were taken down by her. Subsequently she transcribed her notes and Mr. Twining read them over preparatory to signing them and to ascertain whether they were correct, and made a number of corrections. Mr. Cornell came in during——

46 Mr. HAWKINS: One moment; there is no question about Mr. Cornell.

The WITNESS: I was asked who were present.

Mr. HAWKINS: I want a question.

The COURT: I don't think you were asked who were present; I think you were asked what Mr. Twining said.

The WITNESS: The statement was corrected considerably by Mr. Twining, so much so that he desired that Miss Rittenhouse should copy it over again on their typewriter.

Q. While the corrections were being made was anybody present besides yourself and Miss Rittenhouse?

A. Mr. Cornell was present.

Q. Did he take any part in the correction or in the conversation?

Mr. HAWKINS: Objected to as immaterial and irrelevant.

The COURT: Who took part?

The PROSECUTOR: Mr. Cornell.

Objections overruled; Defendants except.

(Exceptions allowed defendants, signed and sealed accordingly.)

A. He did.

Q. Just state now, while he was present and while Twining was present, what was said and done by either or both of them, if anything, in regard to those entries?

A. Cornell was not there when we began, he came in during the talk, I think during the time the correction was being made, and it may have been a little earlier; however, he heard that part of Mr. Twining's statement which related to who was present at a meeting of the Board of Directors which had been spoken of, and the statement Mr. Twining had just made as to who were present differed in one respect from the statement Mr. Cornell had made as to who was present, and that brought Mr. Cornell into the conversation. And after some little talk about the thing Mr. Cornell seemed to recall that Mr. Twining——

Mr. HAWKINS: Objected to.

Q. Won't you state what was said?

47 A. Mr. Cornell said that he must have made a mistake in his statement and that he desired to correct this name. Thereupon this paper——

The PROSECUTOR: I will have this paper now produced marked for identification.

Said paper is marked for identification "State's No. 5 for identification" of this date.

The WITNESS: Thereupon that paper marked No. 5 was prepared, being a copy of a previous statement of Mr. Cornell's and differing only from it in the name.

Mr. HAWKINS: I object to his undertaking to explain its characteristics.

Objection sustained.

The WITNESS: Mr. Twining's statement was subsequently recopied by the stenographer on her typewriter, and I had to leave on the four o'clock train and could not wait for her to complete that.

The COURT: There is very much getting in in answer to what seemed to be a pretty plain question which has no relation to it whatever. We do not want to know about the four o'clock train or any other train.

The WITNESS: Except this, that the statements could not be delivered to me then and there, they were sent to me at Mr. French's restaurant where I went to get a bite of something to eat.

Q. Who brought it to you?

A. Mr. McMurtrie.

Q. Calvin D. McMurtrie?

A. Yes sir.

Q. Did he deliver the statement to you?

A. He did.

Q. What statement do you refer to now?

A. This one (producing statement.)

The PROSECUTOR: I will have this marked.

The said statement is marked for identification "State's No. 6 for ident." of this date.

Q. After the statement was delivered to you, did you again see Mr. Twining or Mr. Cornell in regard to the matters contained in those statements?

A. I think there was no further inquiry of either of them in regard to those matters by me.

48 Q. Prior to the time that they had delivered either of these statements to you or that you had had any conversation with them relative to the items on pages 110 and 111 did you make any examination of the minute book of this association, of this company?

A. I did.

Q. In the course of your examination did you find anything in

relation to or purporting to be in relation to the items on pages 110 and 111?

A. I did.

Q. What did you find?

A. I found what I was told was the——

Q. By whom were you told?

A. Told by Mr. Cornell, I think first by Mr. Cornell——

Mr. ARROWSMITH: I insist that is not a proper answer to the question.

Mr. HAWKINS: He has not told what he found and the trouble is he gets it all mixed up.

The WITNESS: I found this paper (producing).

The PROSECUTOR: I will have this marked for identification.

The said paper is marked for identification "State's No. 7 for ident." of this date.

Q. Did you have any conversation with either of the defendants or both of them in regard to this exhibit.

A. I did.

Q. What did they say about it, if anything?

Mr. HAWKINS: Objected to.

Q. What did they or either of them, and name which one, state, if they did state anything?

Mr. HAWKINS: I object to the question in that form and the Court can see it is improper, because he is about to state what they said without our having an opportunity to object.

Q. What did they say, either of them, and name which one if either of them said anything about it?

The COURT: The conversations, if they were had by either defendant in the absence of the other it ought to appear that way, because the other defendant would not be bound by it.

49 A. What Mr. Cornell has said is incorporated in his statement, the two statements marked 4 and 5, and what was said in Mr. Twining's absence except as to the correction of a name which was made late in the afternoon in Mr. Twining's presence. Mr. Twining's statement was made mostly in Mr. Cornell's absence and wholly or partly corrected in his presence and as corrected appears as Exhibit 6.

Q. Did you have any further conversation with them, or, how did you find this paper exhibit 7?

A. On Saturday the 14th——

The COURT: Where, under what circumstances, Mr. Prosecutor, did he find it? Who was present?

The WITNESS: I asked for the authority under which this stock was purchased——

The COURT: You asked who, Mr. Twining——?

The WITNESS: Yes, and Mr. Cornell, and he told me that it had been purchased by authority of the Board of Directors. I then asked for the minute book and the minute book was handed down to me.

Q. By whom? Well, was Mr. Cornell there when you got it?

Mr. HAWKINS: One moment; I object, the question is suggestive.
The COURT: What is the question?

Q. By whom was the minute book handed down to you and who was present when it was handed to you?

A. I don't think anybody was present but Mr. Cornell. I think he handed it to me. He handed it to me or I took it myself in his presence and he called my attention to the fact that the last minutes were not written in the book and showed me this paper, Exhibit 7, as being the minutes of the meeting which had not yet been transcribed into the book.

Q. Subsequent to the delivery of these statements to you and these conversations that you have spoken about, did you have any further conversation in regard to the transaction on pages 110 and 111, of these minutes, and if so, which one of the defendants did you have such conversation with?

Mr. ARROWSMITH: I object to it so far as it related to the items in the book.

50 Objections overruled; Defendants except.

(Exceptions allowed defendants, signed and sealed accordingly.)

A. I do not quite understand that question.

Q. Did you have any further conversation or did you receive any further document of paper in regard to this transaction on pages 110 and 111, or in regard to either of them or the minutes from either Mr. Twining or Mr. Cornell?

Mr. ARROWSMITH: Objected to so far as it relates to the items in the book.

Objection overruled; Defendants except.

(Exceptions allowed defendants, signed and sealed accordingly.)

A. I received no paper from either of them, I think. Yes, there was one after this conversation of the 16th.

Mr. HAWKINS: I object to the witness going on and making any general statement. He says "Yes."

Q. When did you receive it and who did you receive it from?

A. On the 16th day of February I received jointly from the two defendants what they called the corrected minutes. This conversation which I spoke of in regard to a correction of a name in Mr. Cornell's statement led them both to say that the minutes were mistaken in regard to the presence of one of the directors stated therein to have been present and thereupon these corrected minutes were written changing that name. (Producing paper.)

The PROSECUTOR: I will have this paper marked for identification.

The said paper is marked "State's No. 8 for identification" of this date.

The WITNESS: I think those are the only papers I received from either of the defendants relating to this matter.

Mr. HAWKINS: Is this the one charged in the indictment
51 The PROSECUTOR: This is another one.

Mr. HAWKINS: Then I object to it. These are other minutes now, independent of the minutes charged in the indictment.

Mr. HOFFMAN: That is No. 8.

The COURT: But relative to the same subject matter?

The PROSECUTOR: Yes.

The COURT: Do you want to state your reasons in your objection?

Mr. ARROWSMITH: It is not the matter upon which we are charged.

Mr. HAWKINS: We are absolutely surprised as to any allegations as to these minutes.

The COURT: You certainly could not be affected on presenting these minutes.

Mr. HAWKINS: Yes, but we could be prejudiced with this jury.

The PROSECUTOR: That is what they are offered for, I am free to say. There is no question about that, I mean to charge that these minutes were delivered and they now show the falsity of the original ones.

The COURT: Why aren't they competent to show the falsity of the original minutes? Is not that a circumstance that should go before the jury?

Mr. ARROWSMITH: It is upon that theory that I argued to quash the indictment originally, and your Honor at that time seemed to think that the indictment was good notwithstanding the argument to quash, and they corrected the indictment to cover the very point that we now make, and that is, that it is entirely immaterial whether the statement was false as to who was there or not. The question is it must be a false statement in relation to the affairs of the bank, a resolution, some resolution connected with the affairs of the bank.

Objection overruled; Defendants except.

(Exceptions allowed defendants, signed and sealed accordingly.)

Q. Mr. Vreedenburg, coming back again to the item on
52 page 110 in Exhibit 2, I want to ask you fully for the conversation that you had, if any, with Mr. Twining relative to that entry?

A. You refer to the credit, North American Trust Company, $35,048.77?

Q. Yes, and what, if anything did he say about it to you?

Mr. ARROWSMITH: Objected to.

Objection overruled; Defendants except.

(Exception allowed defendants, signed and sealed accordingly.)

Mr. ARROWSMITH: I also object to it, because as I understand it, it has already been answered. He said it was taken down stenographically and he produced a paper showing the answer in reference to it.

The COURT: Unless it is to cover something he failed to speak of, of course we should not go into it again.

The PROSECUTOR: There has been some confusion about it, because the paper has not been produced taken down by the stenographer.

The COURT: Very well, you may go into it.

The WITNESS: The paper——

Q. I am asking now what did Mr. Twining say, if anything, in regard to the reason of that entry there of $35,048.22, and why it was credited to the North American Trust Company.

Mr. ARROWSMITH: Objected to.

Objection overruled; Defendants except.

(Exception allowed defendants, signed and sealed accordingly.)

A. He said that there was a loan to the North American Trust Company of about $45,000. May I have his statement there to refresh my memory?

Mr. ARROWSMITH: You mean the Miss Rittenhouse statement?

The WITNESS: Yes. (Referring to No. 6.) That that amount represented——

Mr. ARROWSMITH: I object to what it represented.

53 The PROSECUTOR: He has not told now what Mr. Twining said, as I understand it.

Mr. ARROWSMITH: If it is embodied in the state already there, I submit that is all there is to it.

The COURT: Is it embodied in that statement?

The WITNESS: Perhaps not fully. As I said in regard to Mr. Cornell's statement, every sentence was not taken down. The explanation is here. I think in his statement, but pretty briefly and concisely.

The PROSECUTOR: I want it fully and would like to have the jury understand all the facts.

The COURT: State it then quickly as you can.

The WITNESS: That this loan represented money that they had borrowed in the purchase of First National Bank stock.

Q. Who had borrowed?

A. He used the expression "The Purchasing Pool." That is the expression which he has used in his statement, "The Purchasing Pool" paid about $127 per share for it, that is in Exhibit 6.

Q. Did he say who consti-uted the purchasing pool?

A. He did not. He said, "that we paid the North American Trust Company in round figures——"

Mr. ARROWSMITH: Are you reading from the paper?

The WITNESS: Yes, I am reading from a paper.

Mr. ARROWSMITH: I submit we can read that paper as well as he can.

The WITNESS: Well, I will not. He said the money was paid by the Monmouth——

Mr. HAWKINS: I object to that because it already appears that that is in the paper, and we should not have oral evidence of what is embodied in the paper.

The COURT: If it is in the paper, I don't see why we should repeat it.

The PROSECUTOR: It is not all in the paper. That is what I want to get from the witness.

The COURT: Is there anything outside of the paper which he said at that time?

The PROSECUTOR: That is what I want to get at. I think there is.

Mr. ARROWSMITH: He can tell it without reading it.

54 The COURT: If there is anything outside of the paper he may tell it.

The WITNESS: There may have been a number of small details in connection with this that Mr. Twining said that are not in this statement, I just do not recall them at present.

Q. Were you present at any time when Mr. Cornell had a conversation with any other person, not with you, in regard to these so-called minutes?

A. I was.

Q. Who was the person that he had the conversation with?

A. Mr. Patterson.

Q. Was anyone else present?

A. I am not sure who else was present, if anyone, then at the first conversation.

Q. When was the first conversation?

A. There was a second one. It was on the 17th or 18th, I am not sure.

Mr. HOFFMAN: Was that the first one or the second one?

The WITNESS: They both occur-ed on the same day; within a few minutes of one another.

Mr. ARROWSMITH: I object so far as they relate to Twining.

The COURT: It will only be admitted as against Cornell.

Mr. HAWKINS: I object as against Cornell on the ground that it is irrelevant.

Objection overruled, Defendants except.

(Exception allowed defendants, signed and sealed accordingly.)

Q. What was said by Mr. Cornell, if anything, in regard to those minutes?

A. He insisted to Mr. Patterson——

Mr. HAWKINS: I object to the characterization that he insisted——

The WITNESS: He said to Mr. Patterson that the statement which he had made to me to the effect that Mr. Patterson was present at that meeting was the truth.

Q. Go ahead, what else was said by either of them there in your presence?

A. By either of them?

Q. That is, by Patterson or Cornell?

A. Mr. Patterson came in and brought Mr. Cornell into my presence and asked Mr. Cornell and me whether Mr. Cornell

55 had made a statement to me that he Patterson had been present at a meeting of the Board of Directors at which a resolution of authority had been passed to purchase stock of the First National Bank. I told Mr. Patterson such a statement had been made to me by Mr. Cornell——

Mr. HAWKINS: This is a conversation *which* Mr. Patterson in absence of Mr. Cornell?

The WITNESS: No, Mr. Cornell was there. Mr. Cornell said his statement to me was true, that Mr. Patterson was present at that meeting, that he ought to remember it. Mr. Cornell would not admit that he could have made any mistake in the statement he had made to me. Later on, perhaps a half an hour or an hour, Mr. Patterson returned, at that time he had with him Mr. Hawkins, Mr. John F. Hawkins, to represent him and the conversation——

Q. Was Mr. Cornell there then?

A. Yes sir.

Q. All right?

A. A conversation to the same effect took place again and Mr. Cornell made no change in the statement that he had made to me. Mr. Hawkins and Mr. Patterson withdrew upon Mr. Patterson's direction to Mr. Hawkins to take such steps as was necessary to protect him from the statement in question, which he said was false, that he had not been to any such meeting and had never authorized in any way the purchase of any First National Bank stock.

Q. Subsequently did you hear from Mr. Cornell again in regard to that conversation?

A. Yes, subsequently a paper was handed to me.

Q. By whom?

A. I think by Mr. Hawkins, possibly by Mr. Patterson. (Producing paper.)

Q. Is this the paper?

A. That is the paper.

The PROSECUTOR: I will have this paper marked for identification.

The said paper is marked "State's No. 9" for ident. of this date.

Q. Did you call Mr. Cornell's attention to Exhibit (?

A. No, it was signed by Mr. Cornell.

Q. Did you call Mr. Twining's attention to Exhibit 9?

A. No.

56 Q. Or did you inform them of the contents of the same?

A. No, I never have.

Q. From your examination of the affairs of the Trust Company, do you know what relation it had with the North American Trust Company of New York?

Mr. HAWKINS: Objected to.

The COURT: I don't see how that is irrelevant.

The PROSECUTOR: It is simply laying the foundation for another line of examination.

The COURT: As I understand it. What you claim in effect is that these people bought this stock, that they used the funds of the Trust Company for the purpose and when Mr. Vreedenburg came to examine the books of the institution that they represented to him in some way that the purchase of the stock had been made for the benefit of the trust company by virtue of a resolution passed by the Board of Directors, and that they handed him a paper purporting to be a

memorandum or a copy thereof, and now you say that that meeting never happened, that the purchase was never authorized by the board and the paper is false. Now, what do you care about the business of the North American Trust Company.

Mr. ARROWSMITH: I desire to take exception to the statement of the Court before the Jury as to the claim of the facts in this case.

The COURT: I don't say they are the facts, I only say that is as I understand the charge.

Mr. ARROWSMITH: Well, as to the charge.

The COURT: I don't say it is a fact at all. But if I have the right impression as to the intention of the prosecutor, I don't see how it is relevant or necessary to go into the dealings between the trust company and the North American Trust Company.

The PROSECUTOR: Only in so far. I want to show by the present line of examination that this indebtedness on this stock was with the defendants' individuality and that it was not with the trust company, that the trust company had no interest in this transaction until it appears by the books, the 13th day of February. That is the line of this examination now.

57 Mr. HAWKINS: I desire to take an exception to the statement of counsel when he states that he wants to show that this stock belonged to the defendants, or the indebtedness was the defendants' indebtedness and not the trust company's. I want to say further that Mr. Cornell was never identified with it in any way. I would like to take an exception.

The COURT: I sustain the objection to the question.

Q. Do you know if the North American Trust Company of New York acted as one of the Reserve Agents for the Monmouth Trust and Safe Deposit Company?

Mr. HAWKINS: Objected to.

The COURT: I don't see how it is necessary to show that.

The PROSECUTOR: I cannot explain without probably making a statement before the jury which I have no right to make until the Court has ruled upon it. I have no right to get up and make a statement and the other side take exception to it, and the Court will have to rule against me on it.

The COURT: I don't think it is necessary to show what was done on this or anything further in that line.

Q. Did you find anything about the papers and effects of the Monmouth Trust Company showing whose indebtedness it was at the North American Trust Company?

A. Yes, sir.

Q. What did you find?

Mr. HAWKINS: Objected to, the paper will speak for itself.

The COURT: I don't know what he has found, whether it was a paper or what it was.

Q. Just state what you found?

A. I found some letters and notices.

Q. Who were the letters from and to?

Mr. HAWKINS: I object to the question until the originality of the letters are proven.

The COURT: Yes. Of course, they cannot be offered in evidence until they are proven.

Mr. HAWKINS: He is undertaking to refer to them now and to produce them, and there is no evidence that they are the genuine letters.

The COURT: He is going to show the sources of his information in these writings, and before those writings can be submitted to the jury their genuineness must be proven. They cannot be commented upon until they are.

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The PROSECUTOR: I want to get them in a condition to have them identified.

The WITNESS: I found some notices which are addressed to Mr. Twining——

Mr. HAWKINS: I object——

The COURT: The addressed may be stricken out.

Q. You found some notices which you now produce?

A. Yes, sir, in the old correspondence of the bank.

Q. Let me have them and I will have them marked?

A. (Here they are.) And copies of answers. (Producing.)

The COURT: How do you know they are copies of answers?

The WITNESS: I should say, purporting to be copies of answers.

Mr. HAWKINS: That is the difficulty with the testimony of this witness.

The COURT: You simply say you got certain information by reason of certain documents and you now produce the documents.

The PROSECUTOR: I will have them letters marked for identification.

The said letters are marked for identification "State's Nos. 10, 11, 12, 13, 14, 15 for ident." of this date.

(The examination of this witness was then suspended for the time being.)

CALVIN D. M'MURTRY, sworn as a witness on behalf of the State, testifies as follows:

Direct examination by the PROSECUTOR:

Q. Were you at the Monmouth Trust Company at Asbury Park in February last?

A. I was.

Q. What were you doing there, generally?

A. Assisting Mr. Vreedenburg, as an examiner of the institution.

Q. Did you meet Mr. Twining while you were there?

A. I did.

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Q. Did you have any conversation or dealings with Mr. Twining at any time while you were there in February?

A. Casually.

Q. Among your dealings did you receive any message or communication from him that you delivered to Mr. Vreedenburg?

A. Yes sir.
Q. What did you receive?
A. A written statement that he had made, was supposed to have signed.
Q. I show you a paper marked Exhibit 6, and ask you if you have seen that paper before?
A. Yes sir.
Q. When did you see it and where?
A. At the time of the questioning that Mr. Vreedenburg was asked.
Q. In whose possession was it?
A. This paper?
Q. At the time you saw it, yes?
A. Mr. Twining gave it to me.
Q. What did you do with it?
A. I took it to Mr. Vreedenburg.
Q. Did Mr. Twining give you any directions at the time he handed it to you?
A. No, it was simply left to me to take and I did take it to Mr. Vreedenburg.
Q. That was the understanding between whom?
A. Mr. Vreedenburg and Mr. Twining and myself.
Q. Did Mr. Twining say anything when he handed you the paper?
A. No, he simply gave it to me and said he could not sign it. He would not sign it.
The COURT: He would not sign it?
The WITNESS: Yes sir.
Q. During the time that you were in charge of the place, assisting Mr. Vreedenburg, was there any alterations or changes made in any books or papers at the Trust Company.

Mr. ARROWSMITH: Objected to.
Objection sustained.
The PROSECUTOR: That is all.
No Cross Examination.
The COURT: Now, I understand practically that Twining refused to sign the paper.
Mr. ARROWSMITH: That is the statement.
The COURT: But he gave it to this witness.
The PROSECUTOR: He gave it to him for delivery to Mr. Vreedenburg.

60 LARUE R. VREEDENBURG resumes the stand.

Direct examination (continued) by the PROSECUTOR:

Q. While you were there, did you disclose to Mr. Twining and Mr. Cornell the capacity in which you were acting?
A. Yes sir.
Q. When did you do that?

Mr. ARROWSMITH: Objected to.
Objection overruled; Defendants except.

(Exception allowed defendants, signed and sealed accordingly.)

A. There was not very much said, I have been there before.

Mr. ARROWSMITH: He asked you what was said, not whether you had been there before.

The WITNESS: I think my expression was "I came to look things over." I think that is what I said.

Q. Had you ever been there before in your capacity as bank examiner?

A. I had.

Q. While they had been acting as President and Treasurer of the institution?

A. Yes sir.

Q. How often?

Mr. HAWKINS: Objected to as immaterial.

Objection overruled; Defendants except.

(Exception allowed defendants, signed and sealed accordingly.)

A. Once or twice.

Q. In your official capacity?

—. Yes sir.

Recess.

After Recess.

The trial was resumed pursuant to adjournment.

LARUE R. VREEDENBURG resumes the stand.

Direct examination (continued) by the PROSECUTOR:

61 Q. Do you know if $44,875 of the Trust Company's money was used to pay for any of this First National Bank Stock or any portion of that amount?

Mr. HAWKINS: Objected to as irrelevant and incompetent.

Objection overruled, Defendants except.

(Exception allowed defendants, signed and sealed accordingly.)

A. Yes, I so.

Q. When was it paid?

A. On the 19th of January, $35,000, and some dollars was paid and on the 4th of February, I think it was $10,000 was paid.

Q. Both in 1903?

A. Both in 1903, yes sir.

Q. From the funds of the Trust Company?

A. Yes sir.

Q. Do you know how the $35,000 was paid on the 19th of January?

A. It was paid by a draft on the Trust Company drawn by the North American Trust Company of New York.

Q. (Handing witness paper.) Is that the draft?

A. That is the draft.

Mr. ARROWSMITH: This whole line of testimony is objected to.

The COURT: Yes.
The PROSECUTOR: I will have this draft marked for identification.
The said paper is marked "State's No. 16" for ident. of this date.

Q. Do you know how the $10,000 was paid on the 4th of February, as you say?
A. By the five thousand dollar checks.

Mr. ARROWSMITH: That is objected to.
Objection overruled, Defendants except.
(Exception allowed defendants, signed and sealed accordingly.)
62 Mr. ARROWSMITH: Upon the ground that the checks should be produced.
The COURT: Yes.
Q. Whose checks were they?
A. Albert C. Twining's.

Mr. ARROWSMITH: I object, the checks themselves will show.
The COURT: I sustain the objection.

Q. Do you know where those checks are now?
A. The ledger shows that they were returned to Mr. Twining. That is my recollection.
The COURT: Then the testimony is incompetent. Before secondary evidence can be produced of it he would certainly have to be notified to produce them.
The PROSECUTOR: That is all.

Cross-examination by Mr. ARROWSMITH:

Q. I understand you to say that it was the 14th day of January when you came down to the Trust Company?
A. Yes sir.
Q. And you then found the doors of the company closed for business?
A. Yes sir.
Q. And a notice to that effect appeared upon the door of the company?
A. Yes sir.
Q. Mr. Twining was there at that time?
A. Yes sir.
Q. And the other officers of the Bank, I suppose the bookkeeper and——?
A. Only one other, the Treasurer. Only one other officer, the Treasurer, Mr. Cornell.
Q. I mean the clerks or bookkeepers?
A. The clerks were there; I think all of them.
Q. And on that day, when was it that you first had any talk to anybody in reference to the book of minutes or this paper found in the book of the minutes?
A. It was on that day.
Q. And with whom was that talk?
A. The first talk I think was with Mr. Cornell, although I cannot

be positive, but what Mr. Twining might have been present, the minute book was in his room, I thin-, on his desk.

Q. Don't you rem-ber already stating that Mr. Twining was in another room?

A. Perhaps at the time of the conversation he was in another room.

63 Q. That is what you have said?

A. At the time he made that written statement, Mr. Twining was in another room. I am speaking now of the time when I saw that book first.

Q. That is what I am speaking of too, and haven't you already said when that was discovered by you in the book as you have stated, Mr. Twining was in the other room?

A. I think not.

Q. Will you say he was not?

A. No. I won't say whether he was or was not; Mr. Cornell was present.

Q. About what time was it that you first saw this? How long after you got there?

A. I don't know whether I can fix the hour, probably eleven o'clock, may be twelve.

Q. What time did you get there?

A. About half past ten—ten something.

Q. How long did Mr. Twining stay about that day? You remember he left the Trust Company?

A. Well, I don't recall about that, on Saturday.

Q. Don't you remember having a talk with him and suggesting that it was just as well that he should not stay around there?

A. No.

Q. Don't you?

A. No, I don't recollect it.

Q. Don't you remember saying that the place was closed, and it might be unpleasant for him to be around there, it would be just as well if he desired, that he should not be there?

A. No, I don't recall it.

Q. You don't recall that?

A. No.

Q. You won't say that it is not so?

A. Yes, I feel confident that I did not say anything of that kind.

Q. The fact is he did go away?

A. I really don't know.

Q. Don't you remember that?

A. No, I do not recall.

Q. When did you first say anything to him with regard to this paper found in the minute book, if at all that day?

A. I cannot be sure that I spoke to him that day about it, I may have, I cannot be sure.

Q. But you have no recollection of it? That is what I understood on your direct examination?

A. My recollection of when I talked with him at length about it was on Monday afternoon.

64 Q. That was on the 16th?

A. The 16th, yes.

Q. The first talk that you can recall with any certainty, at any rate, in reference to this paper, Exhibit 7, was on Monday some time?

A. That is the first that I will be sure of talking with him in regard to the paper itself.

Q. Where did you see him first? At the Trust Company building?

A. Yes sir.

Q. Do you know how he came there?

A. He was there when I came in.

Q. Didn't you call him up on the 'phone that day?

A. On Monday I did.

Q. I am speaking of Monday?

A. I did.

Q. Is not the occasion of his visit to the Trust Company on Monday due to your calling him up on the 'phone?

A. Yes, I think likely it was.

Q. And when he got there you talked to him in reference to this paper?

A. Yes sir.

Q. You showed it to him?

A. Yes sir.

Q. And you asked him in reference to its accuracy?

A. Yes sir.

Q. And he has said what you have already testified to in that respect?

A. Yes, sir.

Q. Now, have you testified to everything that Mr. Twining did in reference to that paper? Every material thing that you can think of?

A. I don't think of anything else, my impression is that——

Q. If it is only an impression it is not competent?

A. Yes. It is the best of my recollection. I may say, that he was asked in regard to the paper on -aturday, but I cannot say that there was any extended conversation about it.

Q. Nor what was said in reference to it?

A. No.

Mr. ARROWSMITH: I think that is all I desire.

Cross-examination by Mr. HAWKINS:

Q. What do you say, Mr. Vreedenburg, as to the circumstances under which you found Exhibit 7, the minutes?

A. Well, of course, I can only state the best of my recollection. I asked for the authority to purchase the stock and I was told that it had been purchased by authority — minute books in order to

65 have the evidence of that authority, of the Board of Directors and I therefore asked for the — and my recollection is that I asked Mr. Cornell for it, and the book, I think, lay on Mr. Twining's desk, in his little room, on the top of the desk, that is my recollection, and the paper was flat in the book, and it was mentioned to

me as a loose paper, being the minutes of the meeting. The conversation at that time was not continued much in the way of inquiry as to the meeting itself, I feel very confident that I asked Mr. Twining whether those were the minutes, but I could not be absolutely certain that that was on Saturday or on Monday.

Q. When you went into Mr. Twining's room and found this book lying on the desk, who took the book? What was done with the book?

A. Well, my recollection is that Mr. Cornell took the book down and handed it to me. I was right at his elbow.

Q. Then what did you do with the book after he handed it to you?

A. It was taken in the back room.

Q. Then what did you do?

A. Then there I looked at this paper.

Q. You looked at what paper?

A. The loose paper which was said to be the minutes of the last meeting, and after seeing it, I took it in my own possession, I think, I put it in my pocket.

Q. Now, I understand you to say you opened the book?

A. Yes sir.

Q. And you saw there a loose paper?

A. It projected when the book was closed.

Q. And you asked what that paper was?

A. Well, I was told what it was without my asking, I think.

Q. Are you sure you were told what it was or didn't you ask what it was?

A. Well, I was either told without asking or told after asking, one or the other.

Q. You either asked the question "What is this paper?" and were informed; or you were told what it was without asking?

A. I did not quite catch that.

Q. You either found the paper itself and asked what the paper was, or you were told what the paper was without asking?

66 A. Yes, it was one or the other; my recollection is that when I asked for the authority under which the stock was purchased I was told it was purchased by authority of the Board and when I asked for the minutes showing that authority, I was referred to this book and the loose piece of paper in it was mentioned as being the minutes not yet transcribed in the book itself. Whether I asked a separate question for each matter of information I cannot say now.

Q. You testified this morning that you were informed the book of minutes of the institution *were* in the back room, and you said you did not know whether the book was handed to you or whether you went there and took it yourself and examined it, is that correct?

A. Yes, that is correct; I am not sure, I think Mr. Cornell handed it to me.

Q. But you are not sure?

A. Well, it was in my hands within a few feet of the place where it had been deposited previously.

Q. You don't wish to be unfair, do you?

A. No, not at all.

Q. You have already stated that you cannot tell whether you went in there and took the book yourself and opened the book and found the minutes, or whether Mr. Cornell handed it to you, isn't that a proper statement?

A. Well I can add this to limit it more closely, Mr. Cornell led the way to the minute book, and he says, "There it is," and either he took hold of it and handed it down to me, or I took it myself. I don't know which it was.

Q. When you took hold of the book—of course you did take hold of it, didn't you?

A. Yes sir.

Q. Then you found this paper purporting to be the minutes, Exhibit 7, did you not, in the book?

A. Yes sir.

Q. Now, did you inquire at the time what that paper was, or couldn't you discover from its face?

A. It was told me, I think, without any inquiry on my part, that the minutes of the last meeting were not written in the book, that it was on a loose sheet and had not been transcribed yet in the book. I found that as the loose sheet and it was examined both by Mr. Twining and Mr. Cornell as such and not——

Q. You have given some testimony in regard to a note or a draft of the 19th of January for $35,000? There was $45,000*0*, al-
67 together wasn't there?

A. Yes, the draft was $35,000.

Q. I have $45,000, then $35,000 and then $10,000?

A. Yes.

Q. You have undertaken to state where the proceeds of that draft went?

A. Yes sir.

Q. To whom do you say the proceeds went?

A. To the payee of the draft.

Q. Was Mr. Cornell the payee of the draft?

A. No.

Q. He was not in anywise interested in the proceeds of that draft?

A. He don't appear to be by the draft itself.

Q. Is that not also true of the $10,000?

A. As far as I know, I never saw those two checks that made up the $10,000.

Q. I understand you to say that Mr. Cornell when he told you about the purchase of the 381 shares of bank stock for $44,875, that he did not know of the transaction at the time it was made?

A. Yes, he said the draft was given to Mr. Twining in blank, that it was given to him on the date appearing on the stub, January 19th, which is the date of the draft itself, and it was not taken on the books until February 13th, because he did not know just exactly the amount of it.

Q. I understood you to say also with regard to the $35,000,——?

A. That is the $35,000 that I am speaking of now.

Q. You said both about the $44,875, also?

A. Yes sir.

Q. I understood you to say about the $35,000, that Mr. Cornell disclaimed all knowledge of the transaction to you, is that right?

A. That is right; I won't say that he disclaimed all knowledge, he disclaimed all definite knowledge.

Q. You testified this morning that he disclaimed all knowledge, that is the language you used, of the transaction, is that correct or not?

A. I dont' think I said it as unequivocally as that.

Q. You think I wrote it down stronger than you said it?

A. I think you have. I cannot recall very well what he did say about it, I simply remember that his knowledge was meagre.

68 Q. What do you mean by saying that he disclaimed knowledge of the transaction if he had knowledge of it?

A. Well he might know and not tell me, that is what I mean.

Q. But he did disclaim all knowledge?

A. Yes sir.

Q. Then you want to create the impression before this Jury, without having any evidence whatever that he did know and was deceiving you, is that the impression you want to create?

A. No, I don't know whether he knew or not.

Q. Then why don't you say so?

A. I did.

Redirect examination by the PROSECUTOR:

Q. Did Cornell deny that he signed this draft as treasurer of the Company?

A. No, he admitted he signed it, and said he gave it to him in blank.

By the COURT:

Q. You have said that somebody told you that the minutes of the particular meeting in question had not been written up and that they were on a loose paper in the book, do you recollect who it was told you that?

Mr. HAWKINS: I object to that question because he never said so, that he though- somebody told him.

Mr. ARROWSMITH: My objection is that he has already said who that conversation was with.

The WITNESS: They both said that was the paper, both of them.

Mr. ARROWSMITH: Your testimony has been that it was referred to on the fourteenth; that on that date Cornell told you so. I don't think you pretended to say that Twining told you anything about it at that time?

The WITNESS: I cannot say definitely that Mr. Twining said so on Saturday; he did say so on Monday, both of them.

Mr. ARROWSMITH: That is when you called attention to the paper itself in the way that you have testified?

The WITNESS: Yes.

ANNIE E. RITTENHOUSE, sworn as a witness on behalf of the State, testified as follows:

Direct examination by the PROSECUTOR:

69 Q. Were you employed by the Monmouth Trust and Safe Deposit Company at Asbury Park?

A. I was.

Q. How long were you working there before the institution closed?

A. I think about six years.

Q. In what capacity were you employed?

A. As stenographer and typewriter.

Q. Did you continue to perform those duties up to the close of the institution?

A. I did.

Q. As stenographer and typewriter did you keep books of your notes?

A. Yes sir.

Q. I show you a book and ask you if that is one of them?

A. It is, yes sir.

The PROSECUTOR: I will have this book marked for identification. The said book is marked "State's No. 17 for ident." of this date.

Q. Did you on the 14th of February and the subsequent days see the last witness, Mr. Vreedenburg, at the institution?

A. I did, yes sir.

Q. Were you present at any conversation he had with Mr. Cornell?

A. I was.

Q. I show you a paper marked No. 7 and ask you if you know who wrote that document?

A. Well, I cannot say who wrote it, it was written on the typewriter, I presume that I wrote it.

Q. Do you remember whether it was dictated to you by any one at that time or not, and, if so, by whom?

Mr. HAWKINS: I think the question is improper, because she has already said she don't know whether she wrote it or not. Now there is an attempt to get her to say it was dictated to her by somebody when she does not know that she wrote it.

The COURT: Have you ever read that paper before, Miss Rittenhouse?

The WITNESS: I have, yes sir.

The COURT: Do you recollect when you first saw it, or first heard it read, whether it was in writing or not?

The WITNESS: Well, I don't understand that question.

The COURT: I say, do you recollect when you first heard
70 the language, I don't mean whether you ever read it or not, but when you first heard it or saw it?

The WITNESS: I don't remember when I first heard it; no, I don't remember it.

The COURT: Do you recollect of ever writing it?

The WITNESS: Yes, I must have written it; I remember this, I must have written it.

Q. How did you come to write it?
A. Well, it was dictated to me.
Q. By whom?
A. By Mr. Twining.
Q. Mr. Albert C. Twining?
A. Yes sir.
Q. I show you another paper No. 4 and ask you if that paper was written by you under dictation?
A. I think it was, yes sir.
Q. Did you take it down stenographically?
A. I did, yes sir.
Q. Does it appear on your notes in book Exhibit 17?
A. (Examining book.) Yes sir.
Q. It does?
A. Yes sir.
Q. Is it a true transcript of your stenographic notes?
A. Yes sir.
The COURT: Did you say who dictated it?
The WITNESS: That was dictated by Mr. Vreedenburg. That is, I took it down as Mr., I think it was Mr. Twining, but I am not sure though, it does not say on my book who.
Q. Who was present at the time it was dictated to you?
A. Mr. Vreedenburg.
Q. And who else?
A. I think Mr. Cornell. I have nothing more to show.
Q. Now, I show you a paper marked No. 5, and ask you whether you wrote that paper, and, if you did, whether you wrote it from stenographic notes dictated?
A. Yes sir.
Q. That is transcribed also from stenographic notes?
A. Yes sir.
Q. And under whose dictation did you write those notes?
Mr. ARROWSMITH: Was it at anybody's dictation or request?
Q. Did anybody dictate it, or was it merely a request to put it down?
A. I was requested to put down question and answer.
71 Q. By whom?
A. By Mr. Vreedenburg.
Q. Who was present when you put down the question and answer, besides Mr. Vreedenburg, yourself, if any one?
A. Mr. Cornell.
Q. I show you a paper marked Exhibit 6, and ask you if you wrote that, whether it was transcribed from your stenographic notes?
A. Yes, sir.
Q. You transcribed that from your stenographic notes?
A. Yes, sir.
Q. Did you do that under dictation or at the request of somebody in putting down question and answer.
A. I did it at the request of Mr. Vreedenburg.
Q. Who was present besides yourself and Mr. Vreedenburg, if anyone, when you took this down?

A. Why, Mr. Twining.

Q. I show you another paper marked Exhibit No. 8 and ask you if you transcribed that from your notes?

A. Did you ask me if I transcribed this from my notes? I did not, no, sir.

Q. Did you write it?

A. I had no notes for this.

The COURT: Which paper is this.

The PROSECUTOR: That is a corrected copy of No. 7, it is No. 8.

Q. Did you write it?

A. I suppose I did, it is typewritten.

Q. Do you know whether you did it under dictation or under somebody's direction?

A. I did it under somebody's direction, I suppose.

Q. Do you know whose direction it was?

Mr. ARROWSMITH: Have you any recollection about it?

The WITNESS: Well, if it was a corrected copy then I did that. I made one copy and it was corrected and I made another, if this is the one.

Q. I show you No. 7, here is No. 7, and ask you if that is a corrected copy of No. 7 which you made which is marked No. 8?

A. I think it is.

Q. Have you any doubt about it at all?

A. No, I think not. I think it is.

Q. How did you come to make that corrected copy Miss Rittenhouse, at whose request?

A. At Mr. Twining's. I think, I am not positive though about that.

72 Q. Did you also take down stenographically either under dictation or at the request of Mr. Vredenburg any statement or statements by Mr. Twining and Mr. Cornell to which you subsequently swore or made affidavit?

A. I think so, yes, sir.

Q. Is this it?

A. Well, this is a transcript from my notes.

Q. Did you transcribe it yourself from your notes?

A. I did, yes, sir.

Q. You swore to it?

A. I swore to it, yes, sir.

Q. And it is a true and correct transcript from your notes?

A. Yes, sir.

Q. Did you correctly write stenographically what was said and which you transcribed in this Exhibit 18?

A. What was that?

Q. Did you correctly put down stenographically all that was said?

A. I think I did.

Q. There is no doubt about that?

A. I think so.

Q. And you correctly transcribed it in this Exhibit 18?

A. Yes, sir.

The said paper is marked "State's 18" for ident. of this date.

Q. During all the years you were engaged in that institution, who was President of it?

A. Mr. Twining.

Q. Did you take dictation from him continually, or frequently?

A. Yes, sir, frequently.

Q. Are you familiar with his signature, have you seen it often, seen him sign?

A. Yes, sir.

Q. I show you a paper marked No. 12 and ask you whose signature that is?

A. I think that is Mr. Twining's.

Q. I also show you a paper marked No. 14 and ask you whose signature that is?

A. Well, I think that is mine.

Q. Whose name is signed to it?

A. Mr. Twining's name.

Q. How did you come to sign that with Mr. Twining's name?

A. I suppose I was told to do it by Mr. Twining.

Q. Do you recollect the correspondence itself, the letter itself, or any circumstances in connection with it?

A. I remember being asked to write this, yes, sir.

73 Q. You do?

A. Yes, sir.

Q. Were you authorized to sign Mr. Twining's name in that way?

A. I was, yes, sir.

The COURT: Who was you asked by to write it?

The WITNESS: By Mr. Twining.

Q. Did you take stenographic notes of No. 7, or did you write that directly upon the typewriter?

A. I did not take stenographic notes for that.

Q. Did you write that directly upon the typewriter?

A. Yes, sir.

The COURT: Have you told at whose dictation?

The PROSECUTOR: I think she has testified to that.

Q. Did you state at whose instruction or dictation you wrote that?

A. Yes.

Q. Whose?

A. Mr. Twining's.

Cross-examination by Mr. ARROWSMITH:

Q. I understood you to say that this paper No. 6 was—that is, the contents of it was dictated first stenographically by you at the request of Mr. Vreedenburg?

A. Yes, sir.

Q. And the first thing that you have, I see, is "Question. Did you dictate those minutes?" Who asked that question?

A. I presume Mr. Vreedenburg.

Q. You have not any doubt about it, have you?

A. No.

Q. And the answer to that was given by whom as you remember?
A. Mr. Twining.

Cross-examination by Mr. HAWKINS:

Q. I show you Exhibit 4, Miss Rittenhouse, and ask you if that contains all the questions that were asked by Mr. Vreedenburg of Mr. Cornell at that time?

A. Well, I could not state positively, because there might have been some asked that I did not take down. This is the only one that I transcribed.

Q. But is it not a fact that a great many other questions were asked and answered by Mr. Cornell that you were requested not to take down?

A. Well, I cannot say as to that, I don't remember, there might have been some questions asked that I was not asked to take down.

74 Q. Do you remember the circumstance itself? I mean do you remember the time and the occasion and the place where this conversation took place?

A. I remember the place, I don't know exactly the time.

Q. Don't you recollect the fact that there were a great many questions asked by Mr. Vreedenburg, the answers to which were not satisfactory to him and he directed you not to take them down?

A. Well, I did not say all that, no, sir.

Q. You cannot?

A. No, I could not say that.

Q. Did you hear Mr. Vreedenburg say this morning that he asked a great many questions of Mr. Cornell, but he only dictated those questions that he gave answers to him that were satisfactory, did you hear him say that?

A. I don't remember hearing that, no, sir.

Q. Weren't you in the Court room, yes, sir.

A. I was here, yes, but I was not paying attention all the time, I don't remember.

Q. And you have no interest in the case?

A. No, sir.

Q. Now I show you Exhibit 5 and ask you the same question, whether or not everything that was said by Mr. Cornell to Mr. Vreedenburg was taken down?

A. I cannot state positively as to that, no, sir. This is just as I have it on my book.

Q. Have you compared this with your note book?

A. No, I have not.

Q. Then how do you know that you have it that way on your note book?

A. I have not fully compared them, but I have looked over them.

The COURT: She said it was.

Mr. HAWKINS: She practically says now she doesn't know, although she said she did know, and I want to know which statement is correct. She has a right to refer again if she wants to make another statement.

The WITNESS: Well, I have found that I have one name in this answer here that is not here in the book.

The COURT: That is in Exhibit what?

Mr. HAWKINS: This is Exhibit 5.

Q. Then you find that your transcribing of your minutes is evidently incorrect?

A. Well, it seems to be.

75 Q. Now, do you recollect the circumstances under which you took down those questions and answers, or do you rely entirely upon your stenographic notes?

A. What was that question?

Q. I say, do you recollect the circumstances under which you took down those questions and answers or do you rely entirely upon your stenographic notes?

A. Well, I remember the place, I don't remember the time.

Q. Don't you recollect the conversation that was transpiring between Mr. Cornell and Mr. Vreedenburg?

A. Well, I could not remember it word for word, no.

Q. Do you recollect how long you were engaged there in conversation?

A. No, sir, I do not; I do not remember how long.

Q. You cannot tell whether you were five minutes or an hour?

A. No, I think we were longer than five minutes though.

Q. But you cannot tell how long you were there?

A. No, sir.

Q. Do you recollect Mr. Vreedenburg asking you for the minute book?

A. No, sir, I do not. I do not recollect his asking. He may have, I don't remember.

JOHN F. HAWKINS, sworn as a witness on behalf of the State, testifies as follows:

Direct examination by the PROSECUTOR:

Q. I show you Exhibit No. 9 and ask you if that affidavit was subscribed and sworn to before you as Master in Chancery, by David C. Cornell?

A. Yes, sir.

Q. Did you make him acquainted with the contents of the same?

A. Yes, sir. I read it to him.

Q. What did you do with it after it was signed?

A. I took it down and delivered it to Mr. Vreedenburg.

R. A. TUSTING, recalled by the State, testifies as follows:

Direct examination by Mr. FOSTER:

76 Q. Mr. Tusting, I believe you stated this morning that you were a director of the Monmouth Trust and Safe Deposit Company?

A. I did.

Q. For the year- 1902 and 1903, as I put it, that is, up to the close of the institution in February, 1903?

A. I did.

Q. You were a director at least during the months of January and February, were you not, of that year?

A. I was.

Q. Were you present at any special meeting of the Board of Directors of this Company said to have been held on Monday, the 9th day of February, 1903?

A. I was not.

Q. Were you notified that there would be such a special meeting held on that day?

A. I was not.

Q. Do you know if there was such a special meeting of the Board of Directors of the Trust Company held on that day?

A. I know of no such meeting.

Q. Do you know if there was a resolution passed by the Board of Directors of the Trust Company at a special or general or regular meeting of its directors authorizing the purchase of 381 shares of stock of the First National Bank of Asbury Park for $44,875?

A. I do not believe I got the first part of that question.

Q. (Question read.)

A. I know of no such resolution.

Q. At any meeting of the directors?

A. At any meeting.

Q. For the purchase of 381 shares, or any number of shares?

A. Or any number of shares.

Q. At that price $44,875, or any other price?

A. No price.

Q. Do you know whether George F. Kroehl attended a special meeting of the Board of Directors on the 9th day of February?

A. How is that.

Q. I ask you if you know whether George F. Kroehl——

The COURT: I don't see how he can tell.

The PROSECUTOR: I don't know whether he could; he was secretary of the Board of Directors; he said there was no such meeting; and I suppose there is no use going any farther with it.

Mr. ARROWSMITH: He cannot say positively there was no such meeting; that is all argument, he cannot say farther than that he was not present.

77 Q. I show you a paper marked Exhibit 8, and ask you, so far as your knowledge extends, if any of the statements, typewritten statements contain- in that paper are true so far as your knowledge goes?

Mr. ARROWSMITH: Objected to as immaterial and irrelevant.

The COURT: That is merely another way of showing what he has already said. Objection overruled.

Defendants except.

(Exception allowed, defendants signed and sealed accordingly.)

Mr. ARROWSMITH: The ground of my objection is it don't relate to the false minutes which are charged in the indictment.

The PROSECUTOR: It relates to the corrected one, I am going to call his attention to these false minutes in a minute, as soon as I get his answer here.

Mr. ARROWSMITH: We are not charged with any corrected minutes being false.

Objection overruled, Defendants except.

(Exception allowed defendants, signed and sealed accordingly.)

A. Am I to answer that?

The COURT: Yes.

Q. (Question read.)

A. So far as my knowledge goes they are not true.

Q. I show you Exhibit 7, and ask you the same question?

Mr. ARROWSMITH: Objected to. He can state what the facts are within his knowledge, but he cannot characterize it as either true or false.

The WITNESS: I did not characterize it as either true or false, your Honor, I stated in so far as I had knowledge.

Mr. ARROWSMITH: I make my objection to the Court, not to the witness. All he can testify to is that on this day in question when the board met and the resolution was passed he was not
78 present and took no part in any such meeting or resolution. That is all it is possible for him to testify to and for him to characterize the whole paper as true or false is not within the province of the witness.

The COURT: I think the question before related to anything which he was said to have done or any connection with him.

Mr. ARROWSMITH: That is not the question. The question is as to whether the facts stated in that paper are true or false.

The COURT: I think your objection is good and I think I ought to have ruled with you on the other question but I understood the question at that time to ask him whether any of the statements in that paper which related to him were true. Of course he cannot characterize it as to whether it is true as to other people or not.

The PROSECUTOR: Matters within his knowledge, that is what it relates to.

Mr. ARROWSMITH: The only knowledge he had is that he was not present. He cannot characterize it as to his own, it seems to me.

The COURT: I sustain the objection anyway.

Q. As Secretary of the Directors of this Company you stated this morning, I believe, that you kept the minutes of such meetings?

A. I said I attested them.

Q. Did you ever attest Exhibit 7?

A. One of these has my name and the other has not, that is the reason I don't know how to answer it.

Mr. ARROWSMITH: Objected to as the paper itself will show whether he attested it or not.

Objection sustained.

Q. Were you ever, as Secretary of the Board of Directors, requested to attest this by either the President or Treasurer of the Company?

A. I was not requested.

Q. Were you ever notified that the minutes had been written or transcribed in this way by either of them?

A. Never.

Q. Were you aware that such minutes were in existence prior to the closing of the institution on the 13th of February?

A. No sir.

Q. Can you turn to the minute book and tell me when the last meeting of the Board of Directors was held.

79 Mr. ARROWSMITH: That is, as they appear in the minutes?

The PROSECUTOR: As they appear on the minutes.

A. The last minutes recorded in the book were January 15th.

Q. Did the board of directors, to your knowledge hold a meeting after that date?

A. Not to my knowledge.

Q. You had no notice of any meeting?

A. No sir.

Q. Either special or regular after that date?

A. No sir.

The PROSECUTOR: That is all.

Mr. HAWKINS: I don't think I want to ask any questions now. If I conclude I do I want to ask the privilege of recalling him for just one question.

The COURT: Will you do that today or tomorrow?

Mr. HAWKINS: I don't know, I will decide.

The PROSECUTOR: Is George F. Kroehl in Court?

(George F. Kroehl is called.)

The PROSECUTOR: This witness was served I believe, by an officer leaving a subpœna at his house with a member of his family. By Mr. Hulick.

The COURT: When was he served?

Mr. HULICK: On Saturday.

The COURT: He may have an excuse, but he will have to come and give it if you insist on it.

The PROSECUTOR: Yes sir, I need both Mr. Patterson and Mr. Kroehl here.

The COURT: Let the officer be sworn.

THEODORE HULICK, sworn as a witness on behalf of the State, testifies as follows:

Direct examination by the PROSECUTOR:

Q. Did you have a subpœna for service upon George F. Kroehl in the case of the State against Albert C. Twining and Cornell?

A. I did, yes sir.

Q. Did you make service of that subpœna?

A. I made service by leaving it at his usual place of abode, his residence in Asbury Park.

Q. When?
A. On Saturday night.
Q. Who did you leave it with?
A. I left it with the colored gentleman who came to the
80 door, he works in Mr. Kroehl's house, I know him and know he works there.
Q. Did you call there after you made the service again?
A. I did. I went there Saturday evening.
Q. Did you receive information in regard to what became of the subpœna?
A. I found Mrs. Kroehl had come home Saturday evening and the gentleman I left the subpœna with told me that he gave the subpœna to Mrs. Kroehl and she had returned to where Mr. Kroehl was.
Q. Where was that?
A. In New York.

By the COURT:

Q. Do you know whether or not Mrs. Kroehl has been in Asbury Park since last Saturday?
A. Not that I can find out, no sir.
The COURT: It may be he never got it. If he was out of the jurisdiction when it was deliverd to him, of course he would not be obliged to come. However, you may have your rule to show cause tomorrow morning; let Mr. Hulick go in the house and serve it.
The PROSECUTOR: With the exception of Mr. Kroehl and Mr. Patterson, I am ready to close. Mr. Patterson, I think, will be here, because he sent me word he would be here this afternoon from Trenton, and I might state that there is no reason why I should not expect to call Mr. Patterson for the same purpose as Mr. Tusting has just been called for. If counsel can go ahead on that expectation. That is all my testimony will relate to.
I wish to offer now these exhibits that have been marked in this case.
No. 1 is the certificate of incorporation, a certified copy. I believe that was already admitted this morning.
No. 2 is the book of minutes in which No. 7 was found, that is the alleged false minutes.

Mr. ARROWSMITH: I object to the book as immaterial
The PROSECUTOR: I offer the book as being the minute book and containing the last recorded minutes, or attested minutes of the board of directors of that corporation.
Mr. ARROWSMITH: Those are not the minutes we are charged with exhibiting.
81 The PROSECUTOR: It is a circumstance that I think we are entitled to have in the case.
The COURT: You want to offer the book simply as a receptacle in which the paper was found?
The PROSECUTOR: For the further reason, I offer it also as showing the last recorded attested minutes of any meeting held by the

Board of Directors, according to the testimony of the secretary of the corporation, Mr. Tusting.

Objection overruled, Defendants except.

(Exception allowed, defendants signed and sealed accordingly.)

The PROSECUTOR: I offer the cash book No. 8, marked Exhibit No. 3. That is, so far as relates to pages 110 and 111 the items $35,048.77, paid North American Trust Company on the 19th of January and the item in relation to the purchase of the stock on page 111.

Mr. ARROWSMITH: We object to it as immaterial and irrelevant.

Mr. HAWKINS: We also object to it as irrelevant and immaterial and not going to establish the offence charged in the indictment.

The COURT: The difficulty I see with that offer, Mr. Prosecutor, is, the fact that only inferentially can you say, it seems to me, that this was the cash book of that institution, and there is no direct evidence as I recall it, going to show that either of these defendants either made these entries or directed these entries to be made or had any knowledge that the entries were in the book. You only can say that inferentially a man who is the President or officer of an institution might be supposed to have knowledge of the contents of the books, but whether you would be justified in making such an inference as that when it might affect a person's liberty is another proposition.

The PROSECUTOR: I withdraw the offer for the present. I offer the first statement of Cornell marked Exhibit 4.

82 Mr. ARROWSMITH: We object on the part of Twining as not binding upon Twining.

Mr. HAWKINS: We object to it because it is attempting to make a paper which he did not write evidence against him. Suppose a paper is brought in here, as one is brought in here now, purporting to be an affidavit, but having no name subscribed to it whatever, and is offered for evidence before the Court; it is an attempt to give the evidence more force and make it stronger against the defendant. It is entirely proper to testify what was said on that occasion. But because somebody says to Mr. Cornell, "Did you do so and so?" And he answers so and so, and it is taken down stenographically, it cannot be possible as a principle of law that the paper can be evidence. I think it is entirely proper to show what the conversation was, but to offer a paper taken down, what was asked and what was answered by somebody else, is entirely a different proposition. It does not show that Cornell assented to its being written off, it only shows that he was asked those questions, and that he made a reply to those questions, but how anyone can be bound by it I don't know. How in the world can that be used as evidence in a suit against him in this case?

There is another feature about it which is exceedingly objectionable. Mr. Vreedenburg admitted upon the witness stand that he treated Mr. Cornell practically unfairly, that in the course of the entire conversation he abstracted certain portions of it which he wished to use for certain reasons, but he did not undertake to give upon the witness stand the entire conversation. Now, if this paper is offered

in evidence against Mr. Cornell, the actual conversation which transpired on that occasion does not appear to this Court. The full actual conversation has been cut out and only the question there transcribed, or only a question or two of the real conversation is offered here on a piece of paper. I never heard of a proposition of this kind being offered in Court. If Cornell had signed it, if he had said, "I want to give you this paper so that you can have these questions, etc," that would be one thing. But there is no evidence of that kind in this case, and it is entirely incompetent, and that applies to Exhibit No. 5 as strongly as it applies to Exhibit No. 4.

83 The COURT: In the case of No. 4, suppose that it appeared that a man's statement on a certain occasion, for the purpose of preserving it had been taken down by a stenographer, rather than to trust it to human memory, and then had been transcribed. Suppose that the person said, "Well, I was present a- that conversation, and I cannot remember all of the conversation but only a part." But suppose you produced the person who actually took the words down, took down the dictation and transcribed it, wouldn't you under such circumstances say that the paper itself could be the very best possible evidence of what actually was uttered?

Mr. HAWKINS: Why, certainly not. The rule of law is that where notes of a transaction are made by a person in the course of that transaction, that they can refer to them for the purpose of refreshing their memory, but they cannot use the paper or book as evidence. I don't think your Honor ever heard of a proposition of that kind. I never did in the course of my practice. And, moreover, the queerest part of the whole matter is that Mr. Vreedenburg admitted on the witness stand that this was not the conversation that took place at that time, but only a portion of it.

The COURT: Yes. There is no question about that. It is not the entire conversation. The point in my mind is whether it is not the very best kind of evidence, or at least it is competent evidence to show the portion which it purports to show, as proving a part. Anybody else would have the right to testify as to the whole conversation and the testimony ought to be taken together, but where a part of the conversation is taken down and can be proven absolutely as taken down, why is not that better than the person's memory?

Mr. ARROWSMITH: Supposing the course of this trial has embraced a week, and during the course of the trial Mr. Vredenburg or Miss Rittenhouse had testified to a conversation that happened some time relating to the subject matter of the indictment. Supposing it had gone out of the minds of the Jury and the jurors, and supposing it was suggested that the stenographer transcribe that particular testimony, the court might like it and the Jury

84 might like it, and they said, "We think that testimony is important, and so as to be certain and accurate as to what it was, we asked to have that transcribed and take it out to the jury room." That would be clearly incompetent. The Court could not permit it. It could not do it because it would be giving the jury the right to use a certain class of testimony beyond the other testimony that was

given. Take the testimony in contradiction of it, they would have the recollection of what those witnesses had said, and on the other hand they would have a paper purporting to have been the conversation, the record of a conversation rather than the evidence of a conversation, the record of a conversation.

The COURT: That may be so, and, of course, if there is any doubt about it it ought to be resolved in favor of the defendant.

The PROSECUTOR: Just one aspect of it has been touched upon. Suppose Miss Rittenhouse and Mr. Vreedenburg had been placed upon the stand here this morning and asked whether Mr. Cornell made admissions in regard to any of these transactions and they said "Yes," "What did he say, what did he do?" And they would be permitted to tell that and would not be required, and counsel would not expect it and the court would not allow them to go into a rambling conversation of these details, just the admissions that were made. That is just the part of the conversation here, because the other matters were not relevant to the inquiry.

Mr. HAWKINS: There is no evidence that they were not relevant.

The PROSECUTOR: Mr. Vreedenburg's testimony is that all that was relevant to this inquiry he put down.

Mr. HAWKINS: He did not say that; he said what he wanted down he put down.

The COURT: Even if Mr. Vreedenburg considered certain matters not relevant, the Court has a right to pass upon that.

The PROSECUTOR: There is no dispute about that. I do not dispute that for a minute. But the suggestion that the Court made a moment ago is that the defendants can supply the balance and they can supply it, they have a right to do so.

85 Mr. HAWKINS: That was not my argument.

The PROSECUTOR: Why is not that paper proper to go in as an admission on the part of Mr. Cornell. Here it has been preserved in the most positive form, the clearest form it can be preserved in.

The COURT: The most positive form in which it could be preserved, I should think would be the notes of the stenographer.

The PROSECUTOR: She has testified that this is a true transcript after comparing it with her notes this morning.

The COURT: I have doubts about the admissability of the paper itself. I have no doubts about it being admissable to prove from her notes what was said; if she can remember it, she can state without the use of her notes; if she cannot remember she may refresh her memory by the use of her notes.

Mr. ARROWSMITH: I think that will be the true way to do it.

ANNIE E. RITTENHOUSE, recalled by the State, testifies as follows:

Direct examination by the PROSECUTOR:

Q. Will you turn to your notes, Exhibit No. 17, and find where you have the notes in relation to Exhibit No. 4.

*Q.* Mr. HAWKINS: I wish to object to that, if your Honor please. She unquestionably has the right to testify as to what occur-ed on that occasion.

The COURT: Without referring to her notes, if she can.

Mr. HAWKINS: Without referring to her notes if she can, and she unquestionably has a right to refer to her notes if she wishes to, but she has no right for the purpose of giving validity and force to this paper to read this paper and then say this paper is a true transcript of her notes. It seems to me she must read her stenographic notes and let it go at that.

The COURT: I think, Mr. Prosecutor, that you must first ask her if she can remember truly the conversation which was had at that time. If she says she cannot then if she says she took
86 stenographic notes of it and she has them I take it that she can refer to them for the purpose of refreshing her memory as to what the conversation was.

Q. Do you remember the conversation that took place between Mr. Vreedenburg and Mr. Cornell in your presence?

A. I cannot remember the conversation accurately, no. I cannot. I remember the circumstances of the conversation.

Q. Do you remember any conversation that took place between Mr. Vreedenburg and Mr. Cornell in regard to this bank stock and these minutes?

A. No, I cannot say that I can remember it correctly.

Q. Have you got anything from which you can refresh your memory?

A. Yes, sir, I have these notes.

Q. Will you turn to your notes then and tell us what was said?

A. Do you mean in reference to this paper?

Q. In reference to either the purchase of bank stock or the minutes of this meeting?

A. Do you wish me to read it from my notes?

The COURT: Yes.

The WITNESS: "That $35,000 check on the North American Trust Company of New York, was payable to whom?" The answer is, "To the order of themselves."

"The check was delivered to Mr. Twining, he don't know what disposition was made of it. I believe the Monmouth Trust Company not to have been responsible in any way on the loan of the North American Trust Company."

Q. What else did he say?

The COURT: Who said it. Who did you say used this language?

The WITNESS: I have not that down at all. I just have the notes.

The COURT: Do you know who used it?

Mr. PROSECUTOR: My first question directed her attention to that.

The WITNESS: Well, I think it was Mr. Cornell.

Q. My first question, Miss Rittenhouse, directed your attention to any conversation between Mr. Vreedenburg and Mr. Cornell?

A. Yes sir.

Q. Now, do you recall any conversation between them in regard to either the purchase of the bank stock or these minutes?

87 A. This was the conversation that I took down that I have just read.

Q. Do you recall any other conversation, or have you any notes of any other conversation?

The COURT: That is in a question.

The WITNESS: That was the question and answer, yes sir.

The COURT: Did one first ask the questions and another answer them?

The WITNESS: Yes sir.

Mr. ARROWSMITH: The questions were put by Mr. Vreedenburg and the answers by the other.

The COURT: The questions were put by Mr. Vreedenberg and the answers to them by Mr. Cornell?

The WITNESS: Yes sir.

Q. Have you any doubt of whether it was Mr. Cornell or who it was?

Mr. HAWKINS: I think what the witness says ought to go.

The COURT: You may ask it.

Q. Have you any doubt of whether it was Mr. Cornell or not?

A. No, I have not any doubt that it was Mr. Cornell.

Q. Were you present when Mr. Vreedenberg and Mr. Cornell had another conversation in regard to the minutes of the Board of Directors on the 9th of February?

A. I was, yes sir.

Q. Do you recollect what was said between them in regard to that matter?

A. Well, I cannot recollect it accurately, no sir.

Q. Have you any notes of their conversation?

A. I think I have. I wish to say that these notes that I transcribed were corrected, and then I copied them over.

Q. Corrected by whom?

A. Oh, I think Mr. Cornell looked over his and Mr. Twining also looked over his, so that I cannot say that the copy that was shown to me is an exact transcript of my notes.

Q. When you copied them over they were not dictated to you a second time?

A. No, the copy was simply handed back corrected.

Q. Did you correct the copy?

A. I wrote the corrected copy.

88 Q. On the typewriter?

A. Yes sir.

Q. You say there was another conversation between Mr. Cornell and Mr. Vredenburg that you do not recall?

A. Yes sir.

Q. Do you find you have any notes of it?

A. Yes, I find I have.

Q. What do your notes say?

A. It says, Mr. D. C. Cornell, Treasurer——

Mr. HAWKINS: I think she ought to show when this conversation took place before she shows what the notes say.

The COURT: Is there any question about that? We have been all over that this morning.

Mr. HAWKINS: What does your Honor understand it to be?

The PROSECUTOR: I ask the witness if on the 14th or any subsequent date.

The COURT: They had their first conversation on the 14th and they had one on the 16th and I think he said the 17th also. Certainly on Saturday and Monday, now which particular date this was I don't know.

Mr. HAWKINS: I want to know if she recalls the date?

Q. Do you know when this conversation took place, the date of it?

A. I cannot say positively, I think it was Monday.

Q. Was it before or after the institution was closed?

A. It was after the institution was closed.

The COURT: Read it.

The WITNESS: "Mr. D. C. Cornell, Treasurer of the Monmouth Trust and Safe Deposit Company, being duly sworn by Larue Vreedenberg, State Bank Examiner, made the following statement in reply to the questions duly given——

Mr. HAWKINS: I desire to move to strike out that portion which she has read in which it states that Mr. D. C. Cornell under oath made answer to the following statement." Because it is absolutely untrue and the paper they produce here shows that. That is not evidence at all.

The COURT: That is a statement of what was done.

The PROSECUTOR: If your Honor please, this witness has testified from her recollection of the conversation and transactions between Vreedenberg and this man Cornell.

89 The COURT: The swearing and the statement that he was a bank examiner, etc., was not stated by Mr. Cornell, I suppose.

The PROSECUTOR: It is a preliminary statement of what took place in her presence.

The COURT: That is a preliminary statement. What you want to prove, as I understand, is the question Mr. Vreedenberg asked and what Cornell answered. If Cornell was sworn, she can say that from recollection in all probability, "Yes" or "No."

The WITNESS: "Mr. Cornell being shown what purports to be the minutes of a special meeting of the Board of Directors, of February 9th, was asked whether or not he thought those minutes correct and he answered, "I do. Mr. Patterson, Mr. Twining and myself were present, and I was told that Mr. Kroehl and Mr. Harvey were called on the 'phone to confirm the meeting. There was not a formal resolution, nor any aye and nay vote, but the informal assent to the proposition to purchase the First National Bank stock."

The COURT: Who said that, as you know?

The WITNESS: Mr. Cornell.

Q. Did he say anything else?

A. I don't think I have anything else of Mr. Cornell's statement.

Q. Do you know whether he was sworn or not by Mr. Vreedenberg before he made that statement?

A. I cannot remember that. I think he was, but I am not positive.

Q. Have you any other recollection of any other conversation between Cornell and Vredenburg in regard to these matters?

A. Well, I cannot recall anything special, no sir.

Q. Have you any other notes in regard to their conversation, Cornell and Vreedenberg?

The COURT: She has identified but two conversations?

The PROSECUTOR: Yes.

Cross-examination by Mr. HAWKINS:

Q. Just keep at that last conversation. Turn to the part where it said a paper was shown and read that?

A. "Mr. Cornell being shown what purports to be the minutes of a special meeting?"

90 Q. Yes, who dictated that?

A. Mr. Vreedenberg dictated that. Yes sir.

Q. It says, "Mr. Cornell being shown what purports to be a paper of a special meeting."

A. Purports to be the minutes of a special meeting.

Q. Did Mr. Vreedenberg dictate that to you?

A. Yes sir.

Q. He dictated that to you you think on either the 14th of February or on the 16th of February, either Saturday or Monday?

A. Yes sir, I think Monday though.

Cross-examination by Mr. ARROWSMITH:

Q. I show you No. 6. The first thing you have there is a question, "Did you dictate those minutes?" Who asked that question?

A. Mr. Vreedenberg.

Q. Of Mr. Twining?

A. Yes sir.

Q. And the balance of it is what Mr. Twining replied in response to that question?

A. Yes sir.

The COURT: I understand No. — is admitted in evidence by consent?

Mr. ARROWSMITH: Yes sir.

Mr. HAWKINS: I wish to object to it. I do not propose to make any argument on my objection except to say that I think it is incompetent as against Mr. Cornell and I desire to have an exception if it is admitted.

The COURT: Do you claim it binds Cornell in any way, Mr. Prosecutor?

The PROSECUTOR: This paper itself, not alone, no.

Mr. ARROWSMITH: Does it in connection with anything else?

The PROSECUTOR: I think it is a circumstance in the case.

The COURT: Who do you offer it against?

The PROSECUTOR: I offer it against Twining.

The COURT: It is admitted against Twining by consent and not as against Cornell.

The PROSECUTOR: No. 4 and 5 were covered by the testimony of Miss Rittenhouse.

Mr. HAWKINS: I understand that 4 and 5 have been excluded.

The PROSECUTOR: They are withdrawn. They are not of-
91 fered. No. 6 is admitted. No. 7 I offer now, that is the alleged minutes.

The COURT: Is there any objection to that?

Mr. HAWKINS: I don't think I ought to say whether I have any objection or not. If I want to make an objection I would do it.

The COURT: It is admitted.

The PROSECUTOR: I also offer No. 8 the corrected copy of these minutes, the corrected copy of No. 7.

Mr. ARROWSMITH: That is objected to.

The PROSECUTOR: This is the minutes as finally corrected, according to the testimony of Mr. Vreedenberg by Twining and Cornell.

The COURT: By both of them?

The PROSECUTOR: By both of them.

The COURT: It is admitted subject to objection and exception.

(Exception allowed defendants, signed and sealed accordingly.)

Mr. HAWKINS: I think I ought to state as a ground for my objection, in order that the exception may be good, that that paper is a paper purporting to be other minutes than those upon which the indictment is found and a transaction which took place after the transaction upon which *is* the indictment is found, and for that reason I object.

Objection overruled, Defendants except.

(Exception allowed defendants, signed and sealed accordingly.)

The PROSECUTOR: I offer No. 9. The affidavit made by Mr. Cornell before John A. Hawkins.

Mr. ARROWSMITH: That is objected to.

The COURT: Do you offer that against both?

The PROSECUTOR: I offer it against Cornell.

Mr. ARROWSMITH: I take an objection to the admission of that on the ground that it is prejudical to Twining.

Objection overruled, Defendants except.

92 (Exception allowed defendants, signed and sealed accordingly.)

The PROSECUTOR: I offer No. 12, a copy of a letter by Twining to Pierson, Vice President of the National Exchange Bank.

Mr. ARROWSMITH: Objected to as not having been in any way connected with this transaction and immaterial.

The COURT: I don't see how it is competent.

The PROSECUTOR: Possibly not. I don't know that it is at present. I will offer it. I will withhold 14 for the same reason. 15 I withhold for the same reason. I now offer No. 16, the $35,048 draft.

Mr. ARROWSMITH: Objected to so far as the defendant Twining is concerned, because it is not shown that Mr. Twining had any connection with this draft whatever, and I object also for the additional reason that it relates to a transaction of January 19th, 1903, twenty-one days prior to the alleged false minutes.

The PROSECUTOR: This draft is prior to the alleged meeting of the 9th of February.

Mr. HAWKINS: I object to it, if your Honor please, because the

testimony of Mr. Vreedenberg shows that this draft was signed in blank and that Mr. Cornell knew nothing about the disposition of the money or the funds by the persons who received it whatever. I object to it for the further reason that it relates to another transaction entirely independent from this transaction. It might well be that a draft of this kind could be signed by the defendant Cornell, and it might for the purpose of argument be admitted that it was an improper draft, which we contend it was not, but that would not be evidence going to show that on the 9th day of February, they pretended to hold a false meeting and exhibited a false paper. It is the same objection that goes to the first clause in the indictment. A man might be guilty of taking thirty thousand dollars and using the funds of the institution in some particular way, but that would not show or go to show that on the 9th day of Febraury afterwards they held a certain false meeting and for that reason I insist that
93 it is entirely incompetent and must necessarily be prejudicial to this defendant, Cornell.

The COURT: How do you connect that paper, Mr. Prosecutor, with the alleged purchase of stock.

The PROSECUTOR: It is a necessary element of our case that we establish the falsity of these minutes of the 9th of February. Mr. Vreedenberg has testified *juts* before he left the stand here that Mr. Twining, and the books also showed him, that $44,875 or $45,875 of the Trust Company's money had been used in the purchase of this stock.

The COURT: In so far as what he said concerning the book, it seems to me that is not compet-nt because the book is not admitted in evidence. But what did he say about Twining?

The PROSECUTOR: He said that Twining told him that $35,000 in round figures had been paid by the Trust Company to North American in round figures, on the 19th day of January, and subsequently $10,000 more had been paid on the 4th of February. Now the significance of that is, that if this $35,000 was disbursed on the 19th day of January and the balance on the 4th of February, it shows the minutes to be false in this, that on the 9th of Feoruary when they say they authorized the disbursement of $44,000 for the purchase of that stock, if the stock was purchased at all it was purchased on the 19th day of January and the 4th of February by their *dericet*ors before the alleged meeting of the Board of Directors, and also the adoption of this resolution. It is significant circumstance to show the falsity of it, of the alleged minutes.

The COURT: Have you any direct evidence showing, even admitting, for the sake of argument, that Twining admitted that the funds of the institution had purchased this stock, have you any direct evidence to show that those funds were applied by means of this particular paper, so as to make this paper evidence?

The PROSECUTOR: As I understand Mr. Vreedenberg's testimony, when he was on the stand, he said that Twining told him that the Trust Company provided $35,000 to pay the North American for this draft.

Mr. ARROWSMITH: I don't remember that he said that, but if he did that don't identify it.

94 The PROSECUTOR: He also said he called the attention of Mr. David Cornell to this paper, and Mr. Cornell informed him he had no knowledge of the nature of this transaction and had signed it in blank and was not even told how much it had been filled out for until the stub was filled out, until the 13th day of February when the institution closed and he delivered this paper over to Mr. Twining. Now that, with Mr. Twining's own statement, shows what this money was disbursed for, shows it was the Monmouth Trust Company's money and shows that it was di-bursed.

The COURT: Have you anything else, Mr. Arrowsmith?

Mr. ARROWSMITH: I don't think so?

Objection overruled, Defendants except.

(Exception allowed, defendants signed and sealed accordingly.)

The PROSECUTOR: I also offer Miss Rittenhouse's note book.

Mr. HAWKINS: I object to the note book.

Objection sustained.

The PROSECUTOR: I wish to recall her again, in view of the ruling, in regard to the testimony of Mr. Twining.

ANNIE E. RITTENHOUSE, recalled by the State, testifies as follows:

Direct examination by the PROSECUTOR:

Mr. ARROWSMITH: I admit his statement No. 6.

The PROSECUTOR: Then there are no questions.

OLIVER G. ALLEN, sworn as a witness on behalf of the state, testifies as follows:

Direct examination by the PROSECUTOR:

Q. Were you engaged by the Monmouth Trust and Safe Deposit Company?

A. I was, yes sir.

Q. How long prior to the time the institution closed?

A. About three years.

Q. In what capacity?

A. As bookkeeper.

Q. Did you continue in your employment as bookkeeper up to the close of the institution?

A. I did, yes sir.

95 Q. I show you a book marked No. 3 for identification and ask you if that was one of the books of the Monmouth Trust and Safe Deposit Company while you were in its employ?

A. Yes sir.

Q. Will you turn to pages 110 and 111 of this exhibit?

A. (The witness does so.)

Q. I ask you in whose handwriting page 110 is, if you know?

A. Part of it is in my handwriting, part of it in Mr. Cornell's.

Q. I call your attention to an item reading, "North American

Trust Company, $35,048.77, and I ask you in whose handwriting that is?

A. That is Mr. Cornell's.

Q. I call your attention to page 111, to the item reading, "Stocks and Bonds, 381 shares, 1, A. P. $44,875," and ask you in whose handwriting that is?

Mr. HAWKINS: I presume I am preserving my objection originally made to everything that is in these books and my exception.

The COURT: It goes over your objection and exception.

(Exception allowed, defendants signed and sealed accordingly.)

Q. In whose handwriting is it?

A. That is in Mr. Cornell's handwriting.

Q. Was this book No. 3 in active use up to the time the institution was closed?

A. It was, yes sir.

The PROSECUTOR: That is all.

Mr. ARROWSMITH: No cross examination.

Cross-examination by Mr. HAWKINS:

Q. Did you know of your own knowledge what those items were?

—. No sir.

Q. I call your attention, Mr. Allen, to the figures 381, do you say those figures are in Mr. Cornell's handwriting?

A. I cannot say whose they are.

Q. That is a part of the item $44,875?

A. That is a memorandum, yes sir.

Q. And from the books it appears that some other figures had been there, or something else had been there and it had been erased, does it not?

A. It looks that way.

96 The PROSECUTOR: That is in the case of the 381?

Mr. HAWKINS: Yes sir.

Q. The book does not appear to be in the condition in which it originally was, that is, it looks as if something had been rubbed out and something written in?

A. It looks as though something had been erased there, yes sir.

LARUE R. VREEDENBURG, recalled by the State, testifies as follows:

Direct examination by the PROSECUTOR:

Q. Mr. Vreedenburg, are the figures at pages 111 of Exhibit 3, the figures 381, in the condition they were when this book was turned over to you at the close of this institution?

A. It is in the condition it was when I first saw the book about five minutes after I came into the institution.

Q. On what date?

A. The 14th of February, 1903.

Q. And they were still in the control of the institution when you came in there?

A. Yes sir.

Cross-examination by Mr. HAWKINS:

Q. Did you say whose figures they are?

A. No.

Q. Doesn't it appear to you Mr. Vredenburg, that these figures 381 have been written in over something else that has been erased?

A. Yes, But the erasure was made before I saw the book.

Q. You do not say that Mr. Cornell made that erasure, and wrote in those figures, do you?

A. No, I do not say who made the erasure, the entry is for the purchase——

Q. Never mind what the entry is for, I simply ask you about that erasure?

A. Yes, I don't know who made it.

The PROSECUTOR: I now renew the offer of these two items on Exhibit 3?

Mr. HAWKINS: I desire to object because it has no relation to the charge in the indictment. The charge is for making false minutes, not for making false entries in the books, and it has no relation to the allegations of the indictment, and it does not in any wise go to sustain the charge that we came here to meet which was the charge of making a false paper as stated in the indictment, and this
97 in no way goes to show whether the paper was false or not, and for that reason I insist that the book is incompetent; and, that necessarily is prejudicial to the defendant, because, first the entries are there, if there is anything in the entries that is wrong; and, second, because it appears that there was a change and it is not pretended on the part of the State that the change was made by Mr. Cornell.

The COURT: It is admitted as against Cornell.

Defendant- except. Exceptions allowed, defendants signed and sealed accordingly.

The COURT: It is not admitted as against Twining.

The PROSECUTOR: I rest with the right reserved to recall Mr. Kroehl and Mr. Patterson. I am going to call them on the same line on which I recalled Mr. Twining a short time ago, as to whether he attended such a special meeting and whether there was ever such a meeting and whether such a resolution was passed or not at such a meeting.

Mr. ARROWSMITH: That is to say, whether they were present when any such meeting was held or any such resolution passed?

The PROSECUTOR: That is it exactly. The same line I took up with Mr. Tusting. And of course I am going to examine Mr. Patterson in connection with the affidavit that Mr. Hawkins has testified to.

The COURT: Of course, you must then understand and they must

understand that you must be limited before they go on with their case to know exactly what you are going to prove.

Mr. ARROWSMITH: That testimony as I understand it, is limited to the same character of testimony that has already been given by Tusting. The reason I speak of it is that I desire to make a motion and I do not want to go into my case until I make my motion.

The COURT: As I understand it, the testimony these two men are going to be requested to give will be really cumulative on one branch of the case.

The PROSECUTOR: Yes sir, and yet more directly relating to their own acts and conduct.

Mr. HAWKINS: I don't think, even if the Court gave us
98 the right to reserve the making of a motion after we opened our defence, that the Supreme Court would regard that as a proper proceeding. We would be unquestionably waiving our rights under an agreement with the Court and submitting to the jurisdiction of the Court on the theory that the Court was going to deny our motion. Now, I have a great deal of confidence in the Court and I have a great deal of respect for the points we are going to make, and I feel that it is quite probably that the case will terminate after you have heard my distinguished friend's argument, and entertaining that opinion I don't think that we ought to proceed. I do not see how we can legally. I am sure we would lose our rights. Your Honor may think we are acting a little discourteous, but the responsibility for the presence of these witnesses does not rest upon the defence. We would have preferred that they were here. We have associate counsel from New York and he is anxious to get back to his duties, but, at the same time I feel that I cannot consent to the case going on on the part of the defence practically on the theory that the Court is going to deny our motion.

(The Court then admonished the Jury, and took an adjournment until 10.15 o'clock tomorrow, March, 2nd, 1904.)

Second Day.

FREEHOLD, *March 2nd*, 1904.

The trial was resumed this day pursuant to adjournment.

SAMUEL A. PATTERSON, sworn as witness on behalf of the State, testifies as follows:

Direct examination by the PROSECUTOR:

Q. You reside at Asbury Park?
A. Yes sir.
Q. Were you connected in any way with the Monmouth Trust and Safe Deposit Company?
A. Yes sir.
Q. In what way?
A. I was a director.
Q. How long had you been a director?

A. About a year and a half.

99 Q. Were you a director at the time the institution was closed in February, 1903?

A. I was.

Q. And for a year and — half previous thereto?

A. Yes sir.

Q. As a director of the Trust Company did you attend any meeting of the Board of Directors on the 9th day of February, 1903?

A. No.

Q. Did you attend any special meeting of the Board of Directors on the 9th day of February, 1903?

A. No.

Q. Did you have any notice that any meeting, special or regular or general of the Board of Directors would be held on the 9th day of February, 1903?

A. I did not.

Q. Did you on the 9th day of February, 1903, or on any other day, at any meeting of the Board of Directors vote for the purchase of 381 shares of stock of the First National Bank of Asbury Park for the sum of $44,875?

A. No sir.

Q. Did you vote for a resolution authorizing the purchase of any number of shares of the stock of the First National Bank for any price?

Mr. ARROWSMITH: Objected to.

Objection sustained.

Q. Were you present when any conversation was had by the defendants or either of them in regard to the purchase of stock from the First National Bank with money of the Trust Company?

Mr. ARROWSMITH: Objected to.

Q. Did you know that there was a meeting of the Board of Directors, a special meeting of the Board of Directors of the Trust Company held on the 9th day of February?

A. I heard there was.

Q. Who did you hear that from?

Mr. ARROWSMITH: Objected to.

Q. From either of the defendants?

Mr. ARROWSMITH: He says he was not present and did not vote for any such resolution.

Objection sustained.

Q. I show you a paper marked No. 7, and ask you if the statements contained in that paper so far as they relate to you are correct?

100 Mr. ARROWSMITH: Objected to so far as the defendant Twining is concerned. And I object to his characterizing.

Objection sustained.

The PROSECUTOR: I think I am entitled to direct his attention specifically to the paper involved in the trial.

Mr. ARROWSMITH: He has already said he did not attend any meeting on the 9th and did not vote for any resolution.

The COURT: If that is so it makes the minutes false without his characterizing it. Of course, the minutes might be false in some particulars, they would be false in that particular if he did not attend the meeting and did not vote for that.

The PROSECUTOR: I want to direct his attention especially to the paper involved in this question.

The COURT: He did not make it.

The PROSECUTOR: It refers to him and refers to certain occasions in which he is alleged to have participated in certain actions.

The COURT: That is the occasion of which you asked him?

The PROSECUTOR: Yes, in a general way.

Objection sustained.

Q. Did you have any conversation, Mr. Patterson, with either Mr. Twining or Mr. Cornell, in regard to the matters stated in this exhibit No. 7?

Mr. HAWKINS: That is objected to.

Q. And, if so, with whi-h one?

Mr. HAWKINS: Objected to.

The COURT: I will admit it, not to state the conversation, but the fact, I admit that.

A. I did.

Q. When?

A. Why, it was the 14th of February, I think, or thereabouts, 1903.

Q. With whom, which one did you have the conversation with?

A. Mr. Cornell.

Q. What did he say about Exhibit No. 7?

Mr. ARROWSMITH: I make an objection to that so far as the defendant Twining is concerned.

The COURT: It will be admitted as against Cornell and not Twining.

101 Mr. ARROWSMITH: I take an exception to its admission at all.

(Exception allowed, defendants signed and sealed accordingly.)

A. He said he thought I had been present at such a meeting.

Q. What else did he say, if anything, about exhibit 7?

A. And he undertook to refresh my memory as to a meeting of that character and I did not remember it and I denied it, and we left the matter stand in that uncertain way and I had another interview with Mr. Cornell subsequent to that.

Q. How long after that?

A. Well, it was within a few minutes.

Q. Was anybody present at that subsequent interview besides yourself and Mr. Cornell?

A. Yes, sir.
Q. Who?
A. Mr. Hawkins.
Q. Mr. John F. Hawkins?
A. Yes, sir.
Q. Did Mr. Hawkins make any statement in regard to Exhibit 7 at that time?
A. Yes. He repeated his conversation as to his impression that I had been present at such a meeting and I denied it, and he undertook to refresh my memory, but I had no recollection of any such meeting, and he finally admitted that I had not been present at such a meeting and finally said I had not.
Q. And did he give you anything in writing at that time, or execute any writing at that time?
A. Yes.
Q. Embodying that statement that you had not been present?
A. Yes.
Q. Is Exhibit No. 9 the paper that he gave you or that he executed at that time?
A. It is.
Q. Do you know when the Monmouth Trust Company closed?
A. Yes, sir.
Q. When?
A. The 13th of February, 1903.
Q. About what time of the day?
A. Eleven o'clock.
Q. Do you know whether the First National Bank was doing business at that time or whether it had closed?

Mr. ARROWSMITH: Objected to.
Objection sustained.
102 The PROSECUTOR: Do I understand the Court to hold that I cannot show that the First National Bank was closed too?
The COURT: I do not understand the relevancy; there may be some aspect in which it is relevant. I do not see now and cannot see on the face of the question.
The PROSECUTOR: My purpose in doing it is to show that the purchase of the stock of the First National Bank was alleged to have been made by the Trust Company on the same day the First National Bank was closed for business.
Mr. ARROWSMITH: Supposing it was.
The PROSECUTOR: I think that is a significant fact in connection with this whole transaction. I might say, however, to elaborate the thought I have in mind, the theory of the State is that these defendants having used the money of the Trust Company concocted to these minutes, as we claim for the purpose of covering up their use of that money and not being able to make good the money of the Trust Company, which they had used, they then undertook to charge up the stock which they owned and had been carrying, to the Trust Company and they did it at a time when they knew they were going to fail themselves and when they knew the Trust Com-

pany had failed or was about to fail, on that same day, and I think in that connection it is a significant fact to go to the Court and Jury that these minutes were prepared for the purpose of deceiving the examiner as we allege in the indictment and as to how the money was used and why the stock was bought.

The COURT: Of course, that is practically the entire case. If the minutes were false and presented for the purpose of deceiving. But I do not see how the closing of any institution on the same day had any connection at all. If it has any connection it is so slight in view of the evidence you have already got in the case that it is not necessary.

The PROSECUTOR: Does it not strike your Honor as significant? Here is the institution, the President and the Treasurer, closed at eleven o'clock on the 13th day of February, and that same day they make a disbursement of $45,000 to buy stock of a bank.

103 The COURT: You have proved that without proving the time of the closing of the bank. And the significance of the time of the closing of the bank is lost unless the bank sold the stock. They might have purchased this stock from some stockholder, not from the bank itself; it might not have been treasury stock.

Mr. FOSTER: The Trust Company was open for business for two hours and a half after, and if I can show, as I believe I can, that this bank was closed before the Trust Company itself closed at eleven o'clock. I think it is a very significant circumstance in regard to the *bona fides* of this whole transaction.

The COURT: Whose stock do you claim this was?

The PROSECUTOR: We do not know. We claim it was stock belonging to Twining, or at least one of these defendants.

The COURT: Unless it was stock of the bank itself, held by the bank like treasury stock or something of that kind it seems to me the closing of the bank would have very little significance, because if I owned the stock of the bank I could sell it that day when the bank closed its doors.

The PROSECUTOR: I will ask another question.

Q. Where was the First National Bank doing business, at Asbury Park?

Mr. HAWKINS: I object to that question.

Objection overruled, Defendants except.

(Exception allowed defendants, signed and sealed accordingly.)

Mr. ARROWSMITH: We are losing sight of the charge of the indictment. The indictment charges the exhibition of false minutes and the falsity consists of the pretence that there was a meeting of the Board of Directors at which there was a resolution passed authorizing the purchase of this stock. Now, it may be, your Honor has already admitted in this case over our objection, the fact that this was unauthorized, in fact unauthorized, that is, that the stock went into the Trust Company and the purchase of the stock, etc. But

104 the whole question in this case turns, so far as the exhibition of the false minutes are concerned, turns upon the question of whether there was a meeting and a resolution authorizing the

purchase of the stock, and beyond that there can be nothing of relevancy in this case.

The COURT: I think that must be so. If you show, Mr. Prosecutor, that there was no meeting, these minutes were false and if these defendants exhibited those alleged false minutes to the bank examiner it seems to me your case is absolute. It is complete. I don't think there can be any question about that.

The PROSECUTOR: That is all.

Mr. ARROWSMITH: No cross examination.

Mr. HAWKINS: No cross examination.

The PROSECUTOR: I will state that the officer informs me he was unable to serve the rule upon Mr. Kroehl and I rest.

Mr. ARROWSMITH: I would like to call, before the State rests, Mr. Vredenburg for one other question.

LARUE R. VREEDENBURG, recalled by the defendants for further cross examination, testifies as follows:

Cross-examination by Mr. ARROWSMITH:

Q. After you took charge on the 14th day of February of the Trust Company, did you find in its possession 381 shares of the stock referred to?

A. Yes, as an asset of the institution. I found more than that——

Mr. ARROWSMITH: That is all I ask.

The PROSECUTOR: There is one question you asked the witness yesterday in which he replied "Yes," that he came there on the 14th day of January.

Mr. ARROWSMITH: If he said January that should be corrected.

The PROSECUTOR: You asked the question stating January and he said "Yes."

Mr. ARROWSMITH: That was my mistake, I don't know how it happened, but I did not notice it.

The WITNESS: There were more shares.

Mr. ARROWSMITH: No, I did not ask about that.

State rests.

105 Mr. ARROWSMITH: If your Honor please, at this time I desire to make a motion to the Court requesting a direction of a verdict of acquittal as to the defendant, Twining, and *and* before giving my reasons in detail for it, I want to say in a general way that I am well aware that when any Trust Company or Bank or financial institution of this kind closes its doors, fails in its business, as thousands of individuals fail, that there at once goes up a popular clamor, a popular prejudice and a great excitement, and a charge of wrecking the bank, by every person interested in it. This popular clamor, and passion and excitement unconsciously sways not only the community in general and a jury having to pass upon the guilt or innocence of any defendant or defendants, and it unconsciously may sway the Court in the exercise of its judgment and its

duty in regard to passing upon the question of the guilt or innocence of the defendant.

I therefore, on this occasion desire, in the remarks that I make, to appeal from Caesar drunk to Caesar sober. From the drunken Caesar of popular excitement and popular prejudice and clamor of vulgar prejudice, of sensational journalism, to the sober Caesar, the sober judgment or the calm, uninfluenced, unswayed, unbiased judgment of the Court, whose duty and whose pleasure it is in a case of this kind only to serve the public interests and to protect the individual rights of every citizen.

The indictment in this case charges in short that these defendants jointly on the 14th day of February, 1903, then being directors, Twining a President and Director, and Cornell a director of the Monmouth Trust Company, a corporation doing business in this state, with having exhibited a paper to one, Larue Vredenburg, authorized to examine as to the condition of the bank, which paper was false, fraudulent, knowingly false, false to the knowledge of these defendants, and exhibited with the intent to deceive Mr. Vreedenberg the then examiner.

The indictment had charged just what the statute requires, and, in the consideration of this case the Court will remember that this is a penal statute which must be strictly construed, every essential in this statute, every constituent part of the statute going to
105 make up the crime must be alleged in the indictment and proven in the case. Every iota. And that is not all. Nothing except what is in the statute itself can be taken by any indictment or read into its terms.

Now, bearing in mind the statute, bearing in mind the indictment, what are the facts?

It is proven in this case that on the 14th day of February, 1903, Mr. Vreedenberg came down under some instructions *from* Mr. Johnston, the deputy commissioner, for the purpose of examining into the affairs of this bank or taking charge of the bank.

That when he arrived there the bank had closed its doors for business. The proof in this case is by Mr. Patterson that they had closed its doors the day before. That he went in and took charge; sometime during the examination of its affairs on that day he made a discovery in reference to the alleged purchase of 381 shares of stock which was found in some book that has been offered in evidence in this case.

The testimony is that he called the attention of Mr. Cornell to that and that they went into some inner office, found a book there, which book had been presented and offered in evidence in this case, the book of minutes of the corporation. Inside of that book was found a paper, the paper which has been offered in evidence upon which this indictment is found, alleged to be a false paper, alleged to be minutes of a meeting of the Board of Directors authorizing the purchase of 381 shares of stock.

Remember, if your Honor please, that this is a joint indictment against these two defendants and they can only be convicted of their joint acts, they cannot be convicted of separate, independent, discon-

nected acts of each other, there must be some connection between the two in order to convict either or both of these defendants. I do not say that either of them could not be convicted under a joint indictment, but to convict them both there must be some facts showing a joint act of these defendants.

Now, on that day, according to the testimony of Mr. Vreedenberg, I have taken the trouble to have it written out. I shall not read it because I think your Honor there can be no mistake as to
107 what the evidence is. On that day that paper was not shown by Mr. Twining, and there was no conversation had in reference to it on that day. That is the testimony in the case.

The COURT: Pardon me Mr. Arrowsmith, I think that you state that correctly.

MR. ARROWSMITH: I will read the testimony.

The COURT: I want the Prosecutor to agree on that. It seems to me that that is the statement, and that Mr. Twining had no conversation with Mr. Vredenberg until the Monday or Tuesday afterwards when he made some suggestion as to correction.

The PROSECUTOR: Your Honor has overlooked the fact that he says he thinks Mr. Twining and Mr. Cornell were both present when he went into the little room to get the book.

MR. ARROWSMITH: No, he did not. Perhaps I had better read it. (Mr. Arrowsmith reads the cross examination of Mr. Twining by himself, at page 78 down to the cross examination by Mr. Hawkins.)

MR. ARROWSMITH: So that the time he refers to there was on Monday. So I take it that so far as the exact date of the paper is concerned, I shall not touch upon whether it was exhibited, whether the facts disclose that it was exhibited by Mr. Cornell or not, but the allegation in this case is it was the minutes that were exhibited upon the 14th that were the false minutes upon which these defendants are jointly indicted.

Now, there is some other testimony, but I have spoken of all the testimony as to the exhibition of the paper by Twining on Saturday the 14th, the day alleged in this indictment and the day to which the state is bound. On the 16th it appears that there was a communication between Mr. Twining and Mr. Vreedenberg in reference to the paper which had been found on the 14th, and which, if exhibited at all was exhibited on the 14th.

The COURT: Yes, that is the date alleged in the indictment.

MR. ARROWSMITH: Now that conversation was permitted to be given, I take it, by the Court, only for one purpose, it only
108 could have been permitted for one purpose, not to prove the charge that the paper had been exhibited on the 14th, but to prove the charge of the falsity of the paper and the knowledge of the falsity on the part of the defendants, and the intent to deceive Vreedenberg. That testimony could not possibly be competent for any other purpose, and I take it for granted that the Court allowed it upon that ground, and it is a fair subject of debate, at any rate, and perhaps proper, that it should have been allowed for that purpose alone. So that it would make no difference whether the paper

was exhibited by Mr. Twining on Monday or not for the purpose of this suit. That would be the subject of another indictment.

The COURT: On different evidence.

Mr. ARROWSMITH: It was not exhibited there at all.

Now, I come to the question of what is exhibiting a false paper. Of course, the Court in passing upon the question of exhibiting a false paper, has got to determine what is the meaning of exhibiting the paper by these defendants or either of them. We all know in common parlance what exhibiting is. It is to present to a person. The very literal meaning *Ex* out, *Habeo*, to have, or to hold, to hold out to or to hold to, and so we find the definitions in the lexicons well recognized and they are nearly all of them alike. Literally, Exhibited, To hold out or forge, to hold forth or present to view. To present for inspection, to bring forward for acceptance to show, to display, and the illustrations in the lexicons are as to exhibiting a document in Court, or a picture in a gallery, and those are all the meanings that are given of the word "exhibit."

Put it to the test of this case. On the 14 day of February, there is no pretence that Mr. Twining showed to, presented, held forth, or in any way exhibited the paper to Mr. Vreedenberg. Not one scintilla of proof in this case. And that is the test.

What happened on Monday? There was no exhibiting on Monday——

The COURT: No, I think you need not debate that. That is certainly so. There was the correction of a paper.

Mr. ARROWSMITH: That is right; and all that Mr. Twin-
109 ing has ever done in this case, the only proof in this case so far as Mr. Twining is concerned as to the exhibiting of a paper. I -as not speaking now of the making of a paper, or the making of false minutes, in this case the exhibiting is the crime.

On the 14th then there is no proof at all of its being shown by Twining.

This may be running in your Honor's mind. Supposing Twining alone were on trial, supposing there was no proof as to what happened as to Cornell, and that is what you have got to take in this case. You cannot couple in this indictment what was said and done by Cornell and write that up as against Twining. Your Honor has been very careful in your rulings in permitting this testimony as to what was said by Cornell and what was done by Cornell, at the interviews, and the different things that have been shown by Cornell in the absence of Twining, to permit it as to Cornell alone. Supposing this indictment were tried now against Twining alone, and that is the test, and supposing that this testimony were excluded as Cornell, it would have to be, and the testimony were as to Twining alone, and the testimony would be that on the Saturday, the 14th, the day when this paper was claimed to have been exhibited, that Mr. Twining did not exhibit it at all. He did not show it to Vredenburg. He did not present it to Vredenburg. He had no conversation in reference to it with Vreedenburg so far as the testimony in this case shows. And that must be the test.

*Q.* I know that in indictments for misdemeanors, and I might

as well take that up next, because that may be one of the things that may be running through your Honor's mind, and that is, that in indictments for misdemeanors the general rule is that all who aid, assist or abet are equally guilty as the principals——

The COURT: If Twining is to be held he will be held in all probability upon that theory.

Mr. ARROWSMITH: Now, I think I can convince your Honor, I think I can convince any unprejudiced mind in the world that he cannot be held upon that theory. If he is held as an aider or abettor in this case he is held in aiding and abetting Cornell
110 in exhibiting a paper on the 14th. Now, bear that in mind. What proof is there in this case that Mr. Twining did an act, did a thing or said a thing hinting that he aided Cornell in showing this paper, if it was shown by him to Larue Vreedenberg on the 14? Remember that everything that was said on the 16th was after the act had been completed. He could not have done anything on the 16th that aided or abetted the act on the 14th.

The COURT: No, not after the consummation of the act.

Mr. ARROWSMITH: Now, come to the act of the 14th. I challenge the Court, I challenge the prosecutor, I challenge anybody on earth to show an act, a word, a deed of Twining's which shows that he attempted in any way to aid or assist Mr. Cornell in exhibiting a paper. It makes no difference whether he took part in making a paper or not. That is not what we are indicted for. We are indicted for exhibiting it. Vredenburg does not say so. No witness says so. There is no witness in this case that had said that Mr. Twining, intended, attempted or did anything to aid in the exhibiting of this paper, if it was exhibited at that time.

I know that your Honor can take this case dispassionately, I want to have your best judgment about it, without regard to popular clamor, popular prejudice. I know you will attempt to do your duty in this case as if it was a civil case between individuals. I ask you to look over the testimony in this case, I ask you to be brave enough, I ask you to be sincere enough in this case, to look over the testimony, and see that a crowning injustice is not done to this defendant, to convict him of a crime beyond what these defendants both are charged with in this case.

The COURT: What will you say to this proposition? Because I have had it in mind ever since you began speaking about Twining, I should say upon the testimony of Mr. Vreedenberg alone, the testimony standing alone as to what Twining sa-d, that if Twining was convicted of exhibiting this paper on Saturday, the conviction would be set aside I think upon the testimony of Vreedenberg as to the words or acts of Twining on Saturday there is not enough to convict him.

111 But Vreedenberg testifies that he found these alleged false minutes in the minute book on the desk of Twining, in Twining's own room in the bank and on that day, that is, the 14th, he had a conversation with Twining about this particular matter. Now, it is true that Twining did not exhibit the paper. As a matter of fact even if on that day, after the alleged exhibition he had a

talk with Vreedenberg it would not convict Twining of exhibiting the paper unless he made some admission, some statement which would lead you to consider that he meant to have the paper exhibited to him that day and procured it to be exhibited by another person.

Mr. ARROWSMITH: Yes sir, you can prove it by admission, if there were any.

The COURT: Now, what do you say about this proposition? The fact that this paper was found in Twining's office, in the book of minutes of the concern and in the institution on the day that Twining was there, about that being evidence from which a jury is to say in connection with his admissions about the correction of the statement of the minutes as to who attended the meeting, whether or not that is evidence from which the jury is to say whether or not, the producing and exhibiting of the paper on the 14th, was not the joint result of the two defendants. That is to say, that Twining and Cornell had agreed to have it exhibited, and still Twining did not exercise a part in the physical act of exhibiting or he was not a party to it, or he was acting in concert with Cornell although Cornell was the actual medium who disclosed the paper to the examiner.

Mr. ARROWSMITH: I think I can answer your Honor in a word. In the first place that is a conjecture, and the proof in this case is that this paper was found in a book on a desk in the room of Mr. Twining——

The COURT: But found there at the suggestion of Mr. Cornell.

Mr. ARROWSMITH: Yes sir.

The COURT: Who said it was the minutes which had not been entered in the book?

Mr. ARROWSMITH: If this were a charge for the making of the minutes, that would be all right; but supposing you can read
112 into this case—nothing here can be taken by intendment, it must be taken by proof, and the proof in this case is that here was a paper found in the minute book on the desk of Mr. Twining. He may have had some part and I think the proof is in making up that paper. But who can say from the facts in this case that he intended that on this day the 14th, Mr. Cornell should go upon the request as the proof of this case is, of Mr. Vreedenberg, and ask on that day for the exhibition of these minutes. It might well have been in the mind of this defendant that at some time when called upon he would exhibit the paper. That is no proof of guilt. This is the case. That there must be some aiding or abetting in the exhibiting of the paper at that time to that particular person on that particular day.

The COURT: But in an indictment for a conspiracy——

Mr. ARROWSMITH: The rule is very different there. There is no question about it, upon an indictment for conspiracy, but it is a rule in that case alone, and is made an exception to all the general rules in the trial of criminal causes. In an indictment for conspiracy, if it had been shown that this false minute had been made as a result of a conspiracy between Cornell and Twining, it would have been permitted then to show what each of them did separately and distinct

from the other and it would bind both, but that is not this case. Your Honor must not confuse conspiracy with this case.

The COURT: I am not confusing them at all. I was trying to draw the distinction, if there is any distinction.

Mr. ARROWSMITH: I think there is a plain distinction between the two and I am trying to make it clear to your Honor. But in this case, there is the fact that this paper was made. Assuming it was false. Assuming it was false to the knowledge of both of these defendants, I am going to assume that. I have assumed that all the way for the purpose of this argument. That on this day in question these minutes which had been prepared by one or both of these defendants, not having yet been entered in the minute book, were found by the examiner in the book, perhaps produced by Cornell, I am not going to argue that, as to whether it was or not, I am going to leave that entirely, I am not going to make any suggestions upon
113 that point at all. Produced, if you chose, and exhibited by Mr. Cornell, I am willing to go that far in this case, and my argument is then—my whole argument is then, that then your Honor might say that is at least a question for the jury. Now, the only other thing that we have at all, the only other thing that we have at all is aiding or abetting or assisting in the exhibiting of the paper is that it was found there in the book, in their private office. Is it possible that a paper concealed in a book, in a private office by this defendant, and that is all that he does, conceals a false paper in a private book in his private office, is aiding and abetting what somebody may do?

The COURT: The paper might have been there by somebody else putting it there.

Mr. ARROWSMITH: It has not been proven in this case who put it there; it has not been proven that it was there at the time the bank closed. It was proved that it was found more than an hour after the man took possession. How it got there does not appear: for this motion your Honor cannot assume it. You can assume nothing. Nothing can be taken by intendment. Nothing can be taken by presumption. The presumption is the other way. The presumption is that every act of this defendant was good and innocent, was the act of an innocent man and it must be overcome by proof, and the proof is entirely absent in this case.

The COURT: As a matter of fact, was this paper written or typewritten?

The PROSECUTOR: Typewritten, just as it appears here, as it is now. That is the very paper.

The COURT: Are you going to make a motion for Cornell?

Mr. HAWKINS: Yes sir. I just suggested to the prosecutor that if he desired to answer Mr. Arrowsmith, I thought he ought to reply to him now, and I thought—of course it is entirely within the discretion of the Court, but my judgment was that the Court should pass upon Mr. Arrowsmith's motion before I undertake to make an argument at all, because it might avoid the necessity of presenting any extended argument on my part.

The PROSECUTOR: Mr. Arrowsmith has discussed or advanced two

propositions which I think can be answered in regard to this
114 motion. In the first place, he says that as a basis of the whole question the Court shall rule as if Twining had been alone interested. I am willing to take that basis and then rely on the testimony in this case so limited.

Mr. Vreedenberg testified that he arrived on the morning of the 14th of February at ten o'clock, at the Bank. When he arrived he found the two defendants, the only officers, Twining and Cornell, present. He had been there about five minutes, when he was put into possession of the effects of that institution, and while they were there his attention was called, or he discovered the entry upon this exhibit No. 3 of the purchase of this stock and he asked them about it and by what authority they had purchased that stock——

Mr. ARROWSMITH: Asked who?

The PROSECUTOR: "Them" he said in his answer. He is talking now about the officers who were there, and they told him that it was purchased by virtue of a resolution passed by the board of directors; he then said "I want to see the minute book," and then asked where the minutes were and they told him they were on a loose sheet.

Mr. ARROWSMITH: Can you refer to any testimony of that kind.

Mr. PROSECUTOR: Vreedenberg's testimony in chief.

Mr. ARROWSMITH: I say there was no such testimony of that kind.

The COURT: This is a very important matter.

The PROSECUTOR: He was having a conversation with these two defendants. They were both present and he asked for the authority for the purchase of this stock and that Twining told him it was done by virtue of a resolution of the Board of Directors.

Mr. ARROWSMITH: I do not understand there was any such testimony. If there is any question I am perfectly willing to go back and have it cleared up. But I don't recollect any such testimony.

(At the request of the Court the stenographer read that portion of the record which appears at page 55 *et seq.* of this transcript.)

The PROSECUTOR: In regard to the meaning of the word
115 "exhibited" as used in the statute, I think it has a meaning also of represented, shown, presented, held forth or represented. Now, the representations were made by either Cornell or Twining or both to Mr. Vreedenberg, when in reply to that question of his as to the authority for the purchase of this stock they said it was done by resolution or direction or whatever expression you please to call it, of the Board of Directors. Then he was shown the minutes showing the authority. Now, there was acquiescence, an aiding and abetting on the part of Twining in permitting Cornell to go and get that minute book and show him that authority. It was not necessary to exhibit it, to hold it up before his eyes and let him scan it. All that it was necessary to do was to represent that the book of minutes of the board of directors contained that authority. That was the representation made, and the book was finally given as a result of the inquiries made of Cornell in regard to that transaction, and when Cornell took that book to Vredenburg, Twin-

ing could not help to know that as a result of his representations to Vreedenberg he was being given to understand that that stock was purchased by virtue of a resolution of the Board of Directors.

The COURT: I think he could acquiesce in the exhibiting of it and be just as guilty as the man who physically produced the book, provided he actually did acquiesce. But the only question in my mind is whether he was there present when the book was produced by Cornell, physically produced, and there is nothing in evidence, it seems to me from which I should say with such degree of certainty as to take the case from the Jury that Twining was not present when the book was produced. When Vredenburg was upon the stand the Court asked Vreedenberg who was it that made this statement about the authority to purchase the stock and he said that Twining made the statement, if not in so many words he said that in effect, he said Yes, Twining was there, and talked about it, the authority for this purchase, that was evidently the theme of the conversation when both of the defendants were present, and the evidence shows, if it shows anything, it seems to me, that Cornell then
or very shortly afterwards,—there was no evidence to show
116 that Twining was away and not present,—went into Twining's room and got the minutes and came out and produced the false paper, and it seems to me, to say the least, that it is the only point involved in doubt, and if the Jury find that that paper was produced not by his acquiescence or knowledge of Twining, of course, he must be acquitted. And if I felt sure of that, or reasonably sure of it, the case should be taken from the Jury so far as Twining is concerned; but I have got to go upon the assumption, that the weight of evidence might justify another assumption, and it seems to me that the motion is really directed to the weight of the evidence.

Mr. ARROWSMITH: If there is any evidence, I grant you that, if there is any evidence.

The COURT: What difficulty is there in this. If Mr. Vreedenberg has left it in doubt and if Twining as a matter of fact was not present when this book was produced, why it is important for Twining to know it. If Twining was not present, I don't care how false the minutes were, if Twining did not aid and abet and cause or procure this paper to be presented or shown or exhibited or brought to the knowledge of the examiner on the particular day mentioned in the indictment, he has got to be acquitted. There can be no question about that, and if the evidence can be made more specific by directing the attention of Mr. Vreedenberg to that particular subject, what objection is there to his going back upon the stand, and the Court allowing the State to reopen its case?

The PROSECUTOR: I will recall him if the defence do not object, just to clear that point up.

The COURT: Of course, if Mr. Vreedenberg should say that Twining was not there when it was actually exhibited to him, it seems to me that the motion should prevail.

Mr. ARROWSMITH: Now, if your Honor goes that far, of course the testimony upon that point must be from the mouth of Vreeden-

berg, and if he says that "I don't know," then there is an absence of proof which is as much as to say that he was not there.

The COURT: Well, it certainly weakens the State's case against Twining very materially on that point if he says that.

Mr. ARROWSMITH: The matter of recalling Mr. Vreeden-
117 burg is a matter immaterial to us, if it appeals to the discretion of your Honor, and it is a matter of no exception, and if your Honor feels that he ought to be recalled, I don't know as far as I am concerned that I can make any objection, because I think it is a matter purely with your Honor.

The COURT: I would like to have him recalled, because I deem it too important to be left in doubt.

Mr. HAWKINS: One moment. Before Mr. Vredenberg goes on the stand, I desire, if your Honor please, with all due respect, and showing every courtesy to the Court that I possibly can in making the request, to ask an exception to the expressions made by your Honor in which your Honor stated that Cornell exhibited those minutes. I don't think that your Honor has the right to determine that question in that way, you are practically deciding the case ag-inst Cornell the defendant, without giving him the right to go before this Jury, and I ask your Honor now for an exception to all those remarks.

The COURT: You are entitled to an exception, Mr. Hawkins, and I take great pleasure in saying that I did not mean to express any opinion as to the fact as to whether Cornell exhibited them.

(Exception allowed, defendants signed and sealed accordingly.)

Mr. HAWKINS: But you did say so time and again.

The COURT: I did not mean to express any opinion as to the fact as to whether Cornell exhibited the alleged minutes; but I mean to say this, that, for the purpose of argument of Mr. Twining's counsel, I had to accept the evidence as true as against Mr. Twining, and not as true as against Cornell. In that sense I accepted it as true simply as against Twining and the Jury must not be affected by anything that I may have said upon this motion and I shall tell them so, and it is for them to decide and not for the Court to say whether or not as a matter of fact Cornell exhibited. I meant to say simply assuming that the testimony was absolutely true in so far as this motion is concerned it showed an exhibition by Twining
118 and not an exhibition by Cornell. You can have an exception. I make these explanatory remarks for the benefit of the Jury.

Mr. HAWKINS: I desire to take exception, if it is possible, against Mr. Vreedenberg being recalled as a witness. The testimony that he proposes to give, according to the theory of the defendant, Twining, is testimony against Cornell, and I do not understand that there is any doubt now in the mind of the Court or in the mind of the prosecutor as to the testimony which has been presented against Cornell and for that reason I object to his being placed upon the stand.

The COURT: I understand it to be a matter purely discretionary and will not allow an exception.

Mr. ARROWSMITH: Do I understand the Court directs it to be

limited to the one question whether at the time of the presentation of these minutes——

The COURT: Who was present and who was not?

Mr. ARROWSMITH: Who was present.

The COURT: That is all there is about it.

LARUE R. VREEDENBERG, recalled by the State, testifies as follows:

Direct examination by the PROSECUTOR:

Q. Mr. Vreedenberg, at the time this paper Exhibit 7 and the book in which it was contained was taken from Mr. Twining's room, or at the time it was examined by you or shown to you, or you first saw it, who was present?

A. When I first saw the book and the paper in it?

Q. I mean on the 14th?

A. On the 14th of February I know that Mr. Cornell was present, I cannot say who else was present at the moment of its delivery, I think——

Mr. ARROWSMITH: No.

Q. Was Mr. Twining present at any time that day when you had this paper or were examining it in his presence?

A. Well, I have to make a conditional reply. I feel perfectly confident that he was present and that we talked about it. I have not, however, that clear and distinct recollection of talking to him about the minutes like I have of talking to him about the
119 purchase of the stock on that day, nor as I have of talking to him about the minutes on Monday, but I am satisfied that I asked both him and Mr. Cornell about that paper on Saturday. I remember it clearly as to Mr. Cornell on Saturday as well as on Monday. I remember it clearly as to Mr. Twining on Monday, but not clearly on Saturday.

Q. Let me ask again, calling your attention again to Saturday when you first called Mr. Twining's attention as you say to the item in Exhibit 3, how long after that was it before you were shown these minutes?

A. Oh, a few minutes.

Q. Where did you hold your conversation with Mr. Twining in regard to this matter on Saturday—how long after you had the conversation with Mr. Twining about the stock purchase did you first see Exhibit 7, the alleged minutes?

A. It was a few minutes.

Q. Where did you have your conversation with Mr. Twining?

A. I cannot say. It is all one room, separated by partitions, perhaps six feet high, as high as your head, you cannot see over them, they are little apartments and you pass from one to the other, and the doors are all open in going from *from* one apartment to another, we were all more or less passing through. I cannont tell in which room many of these conversations took place. I can name some of them.

Q. After you got the minutes in your possession did you see Mr. Twining still in the Trust Company's room?

A. Yes, Mr. Twining was there I know late on Saturday afternoon. I could not recall that yesterday when I was on the stand,

but he was there late Saturday afternoon. He may not have been there continuously.

Q. So far as you know, after your conversation in regard to the purchase of this stock with him, did he leave the Trust Company or not at that time?

A. How is that.

Mr. ARROWSMITH: Objected to.

Objection overruled. Defendants except.

(Exception allowed defendants, signed and sealed accordingly.)

120 Q. (Question read.) Did he go out of the building?

A. He may have been out for an hour or so.

Q. I say, do you know whether he did or not?

A. I do not recollect that he did, but at the same time he may have been out for an hour or so.

Q. You have no knowledge that he went out of the building?

A. No, I do not recall it.

Cross-examination by Mr. ARROWSMITH:

Q. Do you recollect saying yesterday in reply to me, do you remember my asking you this question?

"Q. When did you first say anything to him, (Twining) with reference to this paper found in the minute book, if at all, that day?" That is, Saturday, the 14th.

Do you remember my asking you that question?

A. I remember you asking me some such question as that, and I was trying then——

Q. Do you remember testifying in answer to that? "A. I cannot be sure that I spoke to him that day about it. I may have, I cannot be sure."

A. Yes sir.

Q. You said that?

A. Yes sir.

Q. That was true?

A. That is true. I cannot be sure that I talked with him on Saturday. I feel confident that I did, but I am not absolutely certain.

Q. I don't want your exp*p*lanations, I want to know if you said that and if that is true?

A. I did, yes sir.

Q. And I asked you: "Q. But you have no recollection of it? That is what I understood on your direct examination." And did you reply, "My recollection of when I talked to him at length about it was on Monday afternoon." "Q. That was on the 16th? A. That was on the 16th, yes," and do you remember this question, "Q. The first talk that you can recall with any certainty, at any rate, in reference to this paper, Exhibit 7, was on Monday some time?"

Do you remember that question?

A. Yes, with certainty.

Q. And you remember replying: "That is the first that I will be sure of talking with him in regard to the paper itself?"

A. Yes, that is the first that I can be certain of talking about it.

Q. Well, sure you said?

A. I don't care which, sure.
121 Q. And you say so still?
A. Yes sir.

Redirect examination by the PROSECUTOR:

Q. In reply to the cross question the other day you stated that you asked Twining about this stock purchase, is that right?
A. Yes sir.

Mr. ARROWSMITH: I object to that, it appears for itself.
The COURT: Yes. Unless you can show some reason.

Q. Was Cornell present at that same time when you asked that question of Twining?

Mr. ARROWSMITH: That is objected to, if your Honor please, there must be some limit to this.
The PROSECUTOR: That is the trouble with this case. Every question asked on the examination of this witness in chief was interrupted by a string of objections so that the answer of the witness is separated by a long distance from the question, and that is the occasion of recalling him today; and that is the occasion for the indefiniteness in his answers and I am trying to clear it up.
The COURT: He said in the direct examination he meant Twining. He said so specifically.
The PROSECUTOR: If the Court is satisfied of it, there is no need of going into it further. Their argument a minute ago was that he did not mean Twining.
The COURT: The record shows that he meant Twining.
Mr. ARROWSMITH: His statement at that time is on the record, too.
The COURT: The motion is denied. I do not deny it without some misgivings, but if there is any error it can be corrected.
Mr. ARROWSMITH: I doubt whether your Honor is giving us your best judgment?
The COURT: Yes sir, I am. If it is an error, it can be remedied, and remedied right her in this Court if there is error for I shall try to state the matter very fully to the Jury. I agree with you as to the law entirely.
Mr. HAWKINS: The disposition of the motion made by my distinguished friend on the other side, after the very learned and brilliant argument which he has presented to the Court, does away
122 with the necessity of any extended argument on my part, and I feel that to save the time of the Court and the jury I should only present the reasons that I have formally to the Court for making a request for an instruction to the jury to acquit.
I first insist that Mr. Vreedenberg's authority to examine this institution has not been proven, legally shown by the evidence in this case and for that reason that the Court should direct that the defendant be acquitted.
Second: I insist that the evidence does not show that Cornell ever exhibited the paper in question to Mr. Vreedenberg, and for that reason he should be acquitted.

Third. I insist that the defendants should not have been tried together and should not have been indicted, jointly, and for that reason I insist that the Court should instruct the Jury to acquit.

Those are the reasons for my motion.

The COURT: The motion is overruled and an exception is allowed. (Exception allowed, defendants signed and sealed accordingly.)

Mr. ARROWSMITH: If your Honor please, so far as the Defendant Twining is concerned, he is content to stand upon the testimony already offered, and shall offer no witnesses.

Mr. HAWKINS: And so are we.

The COURT: Then both sides rest?

Testimony closed.

Mr. Hawkins sums up.

Mr. Hoffman sums up.

The Prosecutor sums up as follows. — this is taken at the request of the Defendants.

The PROSECUTOR: May it please the Court and gentlemen of the Jury, it is not the practice of Judge Hoffman to admonish me as to my duty, and I am always willing and ready to accept a sug-
123 gestion from him. He has reminded me that if I am satisfied that there is no evidence to hold either Cornell or Twining I should frankly say so, and I fully agree with his principles, and, if there were no evidence, not in his opinion, but in the opinion of the Jury, I should say frankly to you you ought to acquit him. I think, however, I can convince you, before I conclude the brief remarks I have to make, that I am justified in insisting that his guilt has been established beyond a reasonable doubt and that I am justified in asking at your hands a verdict of guilty against him.

At the outset I will state that there has been a paper referred to throughout this whole case. It is called Exhibit No. 7. It is these alleged false minutes——

The COURT: I think that book of minutes which was offered in evidence the other day ought not to go in evidence beyond the fact that the paper was found in that book.

The PROSECUTOR: That is all it is offered for, to show that the paper was found in the book of minutes and that it was the book of minutes.

The COURT: The minutes will be excluded, that is, the book.

The PROSECUTOR: Yes, I don't want that in for any other purpose. This is the paper, gentlemen, on which this indictment was based, and it is about time this was read to you. The type written form alone is the form that was offered in evidence, without the pencil or ink annotations, because they were simply memorandums.

"Monmouth Trust and Safe Deposit Company, Asbury Park, N. J.

"A Special meeting of the Board of Directors of this Company was held at the office of the Company, Monday, February 9th, 1903.

"There were present the following directors:

"George F. Kroehl, S. A. Patterson, G. B. M. Harvey, A. C. Twining, D. C. Cornell. The minutes of the regular meeting held January 15th, 1903, were read and on motion duly approved. All

loans taken since the last meeting were gone over carefully
124 and upon motion duly seconded were unanimously approved.

A resolution that the Company buy 381 shares of stock of the First National Bank at $44,875 was adopted.

"On motion the meeting adjourned."

That is the paper, gentlemen, that we claim is false. That is the paper on which these defendants are being tried for exhibiting that paper to Mr. Vreedenberg an examiner of the banking department of this state who was authorized to and was conducting an examination into the affairs of this institution.

There have been two or three suggestions brought out by counsel in summing up that I suppose I ought to touch upon, but as it will interrupt the logical order of the case at this time I am going to confine myself for the present to a discussion of the evidence bearing upon the execution of that paper.

I would like to have you, gentlemen, in your minds, go back with me to the 14th day of February, 1903. I would like to have you go back with me to the Monmouth Trust and Safe Deposit Company's room in the City of Asbury Park as it has been described to you by the witnesses upon the state, a large room divided off into apartments by partitions about as high as a man's head, six feet high, as Mr. Vreedenberg characterized it divided into various small rooms.

Look, if you go into that room with me at shortly after ten o'clock when Mr. Vreedenberg arrived there, and you find him, as he found there, Mr. Twining and Mr. Cornell in charge of that place with the institution closed the day before.

I would like to have you see in your mind's eye, as he testified, Twining and Cornell turn over the property, books and effects of that corporation to him as a banking examiner, and then shortly afterwards, I would like to have you examine with Mr. Vredenburg the entry as it appears upon pages 110 and 111 of this exhibit, and when he gets to this item he reads, 381 shares A. P. $44,875. I would like you to bear in mind that Mr. Twining and Mr. Cornell are standing by him, according to his testimony and that he said, "I asked for the authority under which this stock was purchased."
125 This is a transcript from the stenographer's testimony:

"The COURT: You asked who, Mr. Twining?"

"The WITNESS: Yes, and Mr. Cornell, and he told me that it had been purchased by authority of the Board of Directors. I then asked for the minute book and the minute book was handed down to me."

Now, bear in mind that Twining and Cornell were both standing there, that he is discussing this item on page 111 with them and that he asked for the authority for that item and they referred him to the minute book? Because the minute book, as you all know, gentlemen, is a record in which is preserved the transactions of the Board of Directors of any corporation. When a corporation has its Board of Directors, it meets. What it does is entered in the minute book and a record is preserved of it, and that book is called a minute book, so that if this action as shown on page 111 were authorized as Twining and Cornell said, if that was authorized by the Board

of Directors, then it should appear in the proceedings of the board of directors as entered in the minute book. Therefore, the examiner asks for the minute book and it was handed down to him. What for? Can you conceive why that minute book was handed to him? Because it was presumed to contain the authority they said they had to make the purchase of the stock.

And when the minute book was handed to him, what did he find? He found it closed, as he has described, with this sheet of paper projecting from it, and he carried it from Mr. Twining's office as he has described it, from the top of Mr. Twining's desk to the back room and then when he examined it he was surprised at what he found and he took that from it and took possession of it, as he says.

Does not that bear out Mr. Vreedenburg's testimony? If this paper is true, gentlemen, if it is; if this meeting was held on the 9th day of February, and if this resolution was adopted as this paper says it was, then beyond question what Mr. Twining and Mr. Cornell told Mr. Vredenburg at that time was the absolute simple truth and nothing else. There is no question about that. And I don't care whether good judgment or bad judgment in buy-
126 ing the stock of that bank, that is entirely and absolutely immaterial, if this transaction was as Mr. Twining and Mr. Cornell said at that time, that was not material, if this statement is true, and there is no getting away from it.

They had a perfect right, if this paper was true, to say to Mr. Vreedenburg, "You will find your authority in the minute book." And, having looked in the minute book, that is where he found it.

Who exhibited that paper to him, gentlemen? Wasn't it exhibited? If you ask me where my hat is and I take my key from my pocket and I hand it to you and, and I say "At my office" and you go there, did I exhibit it to you or not, if I find it there——

Mr. HOFFMAN: No.

The PROSECUTOR: Oh, well, you cannot split hairs on that question; a man of any sense who goes up there and sees that hat will admit that it is exhibited to him as a result of my sending him there.

Gentlemen, let me give you another illustration.

There is a book. I tell you, if you open that book you will find something in it at page 100. I do not open the book for you. You open it, you find page 100, is it exhibited to you or is it not, and if it is, who exhibited it? I or did somebody else out in the street? Did somebody else down at Asbury Park call your attention to that?

Suppose you had picked that up on my statement and you found page 100, you opened it, who exhibited that book? Wouldn't I have done so? You cannot split hairs on that question. That paper was exhibited or it was not, and when you are satisfied it was exhibited then we will go to the next point in this case.

My friend Hawkins says, "Why should it be exhibited? What motive is there to make Mr. Cornell to exhibit a paper that was false or any other thing that was false? He did not exhibit it, he says, because he had no motive for doing it. Judge Hoffman, I

believe, says that Twining did not exhibit it because he had no motive for doing it.

Both insist that Twining had all the authority in the world to purchase this stock and did not need any action of the Board
127 of Directors. The sworn testimony, uncontradicted by either Twining or Cornell is that they said they got authority to buy this stock from the Board of Directors.

There is no testimony in this case that Twining assumed the authority or Twining exercised the authority without the Board of Directors, and the uncontradicted testimony is, they got authority from the Board of Directors and that is not denied by either Twining or Cornell, and in passing I might say that neither is it contradicted that this paper was exhibited by Twining and Cornell. They have not taken the stand and told you under oath that they did not exhibit this paper. And I can see how counsel say they do not have to. Well, that is for you to say.

Now, let us see whether they did not exhibit this paper or not. All these transactions did not take place the 14th day of February. Two days later, the 16th day of February, the matter was taken up again and without any reference to anything that took place that day, but referring to this paper that was found on the 14th day of February, Twining and Cornell both make statements in regard to that, and those statements have been placed in evidence. Cornell's statements by the testimony of Miss Rittenhouse, read from her notes, Mr. Twining's statement from Exhibit 6 in this case.

Exhibit 6 was a statement made by Mr. Twining, and it is admitted practically without question, that it was dictated by Mr. Twining, was made by Mr. Twining to Miss Rittenhouse in reply to questions from Mr. Vreedenberg on the 16th of February.

"Q. Did you dictate those minutes referring to Exhibit 7, the one I have just read you?

"Mr. Patterson, Mr. Cornell, Mr. Tusting and myself were here on the 9th of February and went over these matters and as a result I dictated those minutes to Miss Rittenhouse. I had authority from Mr. Harvey at any time to use his name as being present at any Board meeting, Mr. Harvey being a director mentioned as being present on the 9th day of February. (The Prosecutor reads the whole exhibit.)

That brings me right up to the question of the motive on
128 Mr. Twining's part for presenting these false minutes, but before touching upon that I want to refer to Mr. Cornell's statement. He was asked on the 16th of February in regard to both the purchase of the stock and minutes and he says (Reads Mr. Cornell's statement.)

Am I showing you gentlemen, that these men had some knowledge of these minutes and that they were exhibited?

Mr. Patterson told you this morning that they were disavowed by him, and as a result of the expression of that disavowal he received a paper from Mr. Cornell which has been offered in evidence, Defendant's Exhibit 9, which reads as follows:

Did they know whether there had been minutes exhibited, gentlemen?

Mr. ARROWSMITH: Do you assume that that shows that Mr. Twining did?

The PROSECUTOR: Not this paper.

Mr. ARROWSMITH: You said so.

The PROSECUTOR: I say the whole thing. I say it shows that Mr. Twining knew of this paper. Twining's statement shows that he had knowledge that those minutes were exhibited and, gentlemen, Twining had to have that exhibited, those papers; I am free to say and I will say it frankly, he had a greater motive for exhibiting those papers than Mr. Cornell would have had. Because, according, to Mr. Hawkins' statement, there is no evidence in this case to show that Cornell was interested in this stock transaction. The proof is in the statement that there was a pool consisting of himself and some others, at least, Col. Harvey and himself——

Mr. ARROWSMITH: I don't think the statement says that.

The COURT: I think the statement says Harvey was there.

The PROSECUTOR: Harvey furnished the money, that is the expression.

Mr. ARROWSMITH: It does not say anything about the purchase of stock, the pool purchased.

The PROSECUTOR: The shares that are here cost in actual figures about $117 per share, and the purchasing pool paid about $127 per share.

Mr. ARROWSMITH: I do not object to that. You have
129 stated that the purchasing pool consisted among others of Mr. Twining, Col. Harvey and that paper does not show it at all. I object to the statement and assign it as error.

The COURT: It does not require any ruling on my part. The paper is in evidence.

Mr. ARROWSMITH: I don't know as it does.

The PROSECUTOR: "We borrowed this money from the North American Trust Company." He does not say that the Monmouth Trust Company borrowed this money. "We borrowed this money." And then when it was repaid $45,000 by the Trust Company money, he says was used to pay the loan and $10,000 was paid by Cornell and Harvey. Why? What had Cornell and Harvey to do with the stock of the Monmouth Trust Company?

Mr. ARROWSMITH: I assign that as an error, because the stock surrendered by the North American Trust Company, it is not shown had any relation to the purchase of stock of the Monmouth Trust Company, the purchase by the Monmouth Trust Company is long subsequent to the transaction with the North American Trust Company and has no relation to it whatever so far as the evidence in this case shows.

The PROSECUTOR: Then we want to find out also, gentlemen, why on the 19th day of January, $35,000 of this Company's money was used to pay the North American loan. That is in evidence. If this was Twining's transaction, if this pool purchased this stock long before the Trust Company did, if they had this money from

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the North American Trust Company long before the Trust Company bought this stock, then, why, nearly three weeks' prior to the purchase of this stock, was $35,000 of this Company's money turned over to the North American? To pay a loan, you say? What loan? Mr. Cornell says on his oath that the Monmouth Trust Company, so far as he was concerned as treasurer and director, was not interested in the loan of the North American. Then why was this made out in blank? Made payable to the North American Trust Company and delivered to them?

But that is not all. It is in evidence here by the evidence of Twining and Cornell, that on the 4th day of February, five
130 days after the alleged meeting of the Board and nine days before the institution closed, ten thousand dollars more of this Company's money was used for the payment of this stock, and Mr. Twining bears that out in Exhibit 6.

Now, are you getting a motive for the exhibiting of these minutes? And are you getting the motive that prompted them on the morning this institution closed to do that? Just think a minute. Here is the president and treasurer of an institution, a trust company, that closed the doors of that institution at eleven o'clock on the morning of the 13th day of February, 1903—mind you, they closed the doors, and an officer in charge under the banking department—and they presumably opened, like all institutions do, somewhere in the neighborhood of nine o'clock, or eight or seven, even, if you please, but they were on hand that morning and if they were conducting the business of that institution properly they knew that morning that they were going to close the doors of that institution.

Mr. ARROWSMITH: I desire to assign that as error. There is no fact in this case from which that can be drawn.

The PROSECUTOR: And, yet, closing that institution at eleven o'clock, they took $44,875, of the money of that Trust Company, so they say in the entry on page 111, and they invest it in 381 shares of the stock of the First National Bank of Asbury Park. Why did they want that investment at that particular time? What attraction did the stock of the First National Bank have for them on that particular morning, so that they took $44,000 and invested it? If they had $44,875 in their treasury there for investment on that morning, do you imagine the doors of that institution would have been closed, and closed apparently by its President and Treasurer?

Why, they would have been as solvent as any institution probably that you would find in the County, with that amount of money at their command. And yet, with that amount of money at their command, with that amount of money ready for investment, they closed the doors of that institution.

On the other hand, gentlemen, with 381 shares of stock, if the stock was a valid investment, a good investment, in my judg-
131 ment, they could have gone out and pledged the stock. But that was not it. That investment was not made by the Trust Company on the 13th day of February for 381 shares or any other number of shares.

The situation was just this. On the 19th day of January they paid $35,000 of the Trust Company's money on account of their loan to the North American Trust Company. On the 4th day of February they paid $10,000 more of the Trust Company's money——

Mr. ARROWSMITH: Who do you mean to say by "they?"

The PROSECUTOR: Mr. Cornell.

Mr. ARROWSMITH: That Mr. Cornell had $35,000?

The PROSECUTOR: Why, yes, when he gave that draft in blank to A. C. Twining without knowing what it was to be used for.

Mr. ARROWSMITH: I desire to assign that as error. There is nothing of that kind in this case and it is error for the Prosecutor to draw that conclusion.

The PROSECUTOR: And yet, though Cornell gave that blank check signed to Mr. Twining on that day, the stub was not filled out until the 13th of February, 1903, when the institution closed its doors. The reason he did not fill it out was he did not know the amount of that draft at all until that time. That is the testimony of Mr. Vreedenberg. I will say, however, that Mr. Cornell got no benefit, in my judgment, from a dollar's use of that money. I am free to say that. Nor from the other $10,000. But he knew of the transaction and could not help to know it. Then again on the 4th of February, $10,000 more was paid on account of the debt of Twining or whoever constituted this purchasing pool, not on account of anything due from the Monmouth Trust Company, and that money was taken from the coffers of the Trust Company.

That is the undisputed evidence. On the 4th of February you have $45,000 in round figures of the Trust Company's money diverted to the use of this purchasing pool, according to the testimony of Albert C. Twining. When the institution closed on the 13th of February the purchasing pool owed that Trust Company $45,000 in round figures and it was only a question——

Mr. ARROWSMITH: I desire to assign that as error. It
132 is certainly to the prejudice of the defendant and not warranted by any testimony in the case.

The PROSECUTOR: It was only a que-tion of how soon somebody was coming down to examine the affairs of that institution, because it was closed. It was necessary for something to be done. It was talked over and entered upon the books of the Trust Company as a purchase and to show authority for that purchase these minutes were concocted and then exhibited to the examiner to fool him. That would have fooled him, too, gentlemen, if it had not been for the fact that he met Mr. S. A. Patterson, and met Mr. Tusting and asked them if those minutes were true.

Mr. ARROWSMITH: I desire to assign that as error.

Mr. HAWKINS: I also desire to assign that as error.

The COURT: I don't think there is any testimony to that effect.

The PROSECUTOR: Mr. Patterson testified this morning that it was the result of something that Mr. Vreedenberg had said to him. He did not give the conversation, of course, he could not.

Mr. ARROWSMITH: We assign that as error.

The COURT: You must state that at your own peril. I cannot recollect it.

The PROSECUTOR: I think my recollection is as good as theirs on it. I will take the responsibility. As a result then, as I say, Mr. Vreedenberg would have taken those minutes for true, he might have been deceived by them, as we claim the effort was made to deceive him, but he gets Mr. R. A. Tusting, and you get Mr. Tusting before you on this witness stand and he tells you of his never having attended any such meeting on the 9th day of February or any other time, and not a solitary dollar was ever authorized to be invested in the stock of the First National Bank.

Mr. S. A. Patterson goes on the stand this morning and tells you practically the same thing. Mr. Cornell's affidavit, Exhibit 9, is produced before you and tells you exactly the same thing, and I want to say that there are three, two or three other men, there is George F. Kroehl, whom the State endeavored to subpœna, he is not here, and there is George B. Harvey, who is beyond the jurisdiction of the Court——

133 Mr. ARROWSMITH: We desire to assign that — error. There is no proof of that in the evidence.

The PROSECUTOR: They are not here and are not produced by the State to testify as witnesses whether or not they were present at such a meeting. But, gentlemen, there were two men here who are alleged to have been present at that meeting, Messrs. Twining and Cornell, who could have taken the stand and who could have told you. On their oath they — both say that they were present at that meeting and that the resolution was adopted authorizing the purchase of this stock. Did they do it? And if they did not do it why didn't they do it? Can you find an answer?

Now, one thing more. Judge Hoffman has characterized, and I think fairly characterized, the testimony of Mr. Vreedenberg. I have never seen a lawyer yet that I think could take that stand as a witness or any other stand as a witness and tell you in clear, brief, pointed statement just what he knows about the case, and I don't think you have. But he does tell you, throughout this case, gentlemen, let it be qualified as much as you like, let him hem and haw about it as much as you please, let him use all the refinements he pleases, he finally gives you facts, although sometimes he had to make a speech to do it. You could not get away from the fact that this was called to his attention and brought to his notice and both were present, and I don't know which one told him——

Mr. ARROWSMITH: I assign that as error, there is no testimony of that kind at all.

The PROSECUTOR: I am going to read that to you, gentlemen, so that there will be no dispute about it, it may go on the record. My friends have taken great delight, in making thes- interruptions and I suppose they have acted within their rights, but it is not going to interfere with the doings of justice in this case. I have got no re-son to misread this testimony and I am not going to gain anything by misreading it. You remember the testimony just as well as I do,

and there is nothing to be gained by my standing up here and saying something was sworn to that was not.

I said something a moment ago which they assign as error, that what I said wasn't true and was not the fact: I will read it to you:

134 "The WITNESS: I asked for the authority under which the stock was purchased——"

"The COURT: You asked who, Mr. Twining?——"

"The WITNESS: Yes, and Mr. Cornell, and he told me that it had been purchased by authority of the Board of Directors. I then asked for the minute book and the minute book was handed down to me."

That is the authority that I have referred to. That is where I am said to be wrong in the statement of the testimony. That is where I am said to be commenting unfairly in regard to the testimony in this case.

Gentlemen, these interruptions are not without a purpose or without a motive. The interruptions are to prevent the continuity of the prosecution's argument to this Jury.

Mr. ARROWSMITH: I object and assign that as error.

Mr. HAWKINS: I object to the counsel characterizing our motives in making our interruptions. We have certainly legal rights in this case, and one right is to object whenever our client's rights are being attacked. Whenever we have made an objection the Court rules upon it, and if we were right the Court ruled in our favor and if we were wrong the Court ruled against us. I do know this, out of 100 objections we have made at least fifty were ruled by the Court in our favor.

The PROSECUTOR: There is a sample of the objection, there is a sample of the objection. I am expected now to go on and pick up the line of argument where I left off.

But it seems to me they must be in desperate straits where such methods have got to be resorted to in defence of men charged with a crime of this kind.

Now, gentlemen, what reason have I got, any more than you, to stand up here and say these men are guilty, if they are innocent?

Mr. ARROWSMITH: We assign that as error, he has no right to state what he thinks about it.

The PROSECUTOR: I ask you, what right have I, gentlemen, to get up and say, any more than you have to get up and say, that these men are guilty if the evidence does not establish their guilt?

135 Can you find any motive in my conduct in this case such as was suggested by my friends on the other side, that I have anything to do except to perform a public duty, just as well as you have to perform yours. That is all that I have got to do with it. When I leave this case with you, gentlemen, I am through with it, and your verdict will be absolutely immaterial to me, whether it is guilty or innocent. But I am anxious to see that not only shall justice be done these men, but that justice shall be done to the people of this County. There are two parties to this controversy, the State and these defendants. The State is just as much entitled to justice at your hands as they are, and it is that that I appeal for.

I have no desire by any unfair means to work or obtain a verdict from you, but I submit in all candor that the state has established the guilt of thes- two defendants beyond all reasonable doubt, beyond a doubt.

Can you sit there now and on your oath, throwing aside what I say, throwing aside what my friends have said, and taking simply the testimony and all the testimony in this case, not a few lines of it picked out for you, but taking all of it, can you sit there and on your oaths conscientiously and honestly say, "We do not know about this?" If you can, there is nothing under Heaven for you to do but acquit them. If you cannot honestly say that, gentlemen, you should find them guilty.

I think the State deserves a verdict of guilty at your hands and I ask it against both defendants.

(The Court then informed the Jury that they would be charged before dinner and allowed to go to dinner when they would be brought back to their room for deliberation on their verdict.)

The Court then charged the Jury as follows:

136 *Charge.*

HEISLEY, *J.:*

Gentlemen of the Jury; this indictment is founded upon the 17th Section of the Trust Company Act of this State, passed at the session of the legislature of 1899. You will take the indictment with you and find what the charge made by the State is as expressed in legal language or verbiage.

In effect it is this; that there was a trust company existing at Asbury Park of which these two defendants were directors, Twining being the president, and Cornell the treasurer.

That there had been a large amount of money misapplied, some thirty or forty thousand dollars, of the funds of that trust company, and to deceive the Banking Department of the State, that is, the representative of that department who had the power to make an examination as to the condition of that trust company, they handed to this examiner, Mr. Vreedenberg, or exhibited to him, in the language of the statute, a paper which they said to Vreedenberg was the minutes of a meeting of the Board of Directors of that institution held on February 9th, at which the purchase of 381 shares of the capital stock of the First National Bank of Asbury Park was authorized.

This money which was misapplied, it is claimed by the state, was misapplied in the purchase of that stock.

Now, I want to say to you, at the outset, that in this case, as in all cases, the law presumes these defendants to be innocent. That is unquestionably the law. That it is the duty of the state to prove them guilty beyond all reasonable doubt. It is not the duty of a defendant in any criminal proceeding to prove his innocence. The State must prove his gu-t beyond all reasonable doubt.

If, after hearing all this evidence and considering it, there remains in your mind a doubt as to any essential fact, any fact essen-

tial towards the completion of this crime, you should resolve that doubt in favor of the defendant or defendants, and acquit.

And as to the weight of evidence, gentlemen, and as to what are facts and what are not, what facts the testimony tends to prove
137 or disprove, you, and not the Court, are the absolute judge. It makes no difference what the Court may think about the guilt or innocence of these defendants. If you felt satisfied that the Court felt that these men were absolutely guilty, you would not be justified in convicting them unless you also believed beyond a reasonable doubt that they were guilty. I do not mean to say now in any way what I may think of the case, but the fact that the Court may believe a person guilty, ought to have no weight at all upon the jury. You are sworn, gentlemen, to exercise your judgment and you are to exercise it simply as it may be influenced by the evidence.

Now, this is a serious charge made against these men. There is no question but that banks and trust companies ought to be operated honestly. There should be no doubt about that. The legislature, in order to protect the people doing business with those institutions, has devised a means of having those institutions examined. It makes it the duty of the officers of the institution to give the examiner certain information and the law says, that when the bank examiner comes around to examine the institution, if any officer of that institution exhibits to him a false paper or makes a false statement with intent to deceive him as to the condition of the bank, he is guilty of a high misdemeanor, and may, in the discretion of the Court before which he is convicted, be either fined or imprisoned, and imprisoned not more than seven years, but it may be seven years if the Court in its discretion deems that proper.

It is sufficient to say, gentlemen, that if these men misappropriated the funds of that bank or that institution for the purchase of this stock or in any other way, and then undertook to deceive the bank examiner, as this indictment charges, they did, and in that manner did deceive him, it is of the utmost importance that the men who did that should be convicted. On the other hand, if there is any reasonable doubt about the guilt of these men, or either of them, as to their knowingly exhibiting a false report to this man with intent to deceive him, they should be acquitted.

Now, I am free to say that in this county there has been
138 considerable talk and discussion about this institution at Asbury Park, and yet I want to say to you, there are over eighty thousand people in this county, and if I was serving upon this jury, and if I had a reasonable doubt as to the guilt of either one of these men, in the exercise of my solemn duty, under my oath, I would acquit them, even if it made the whole eighty thousand people in the county angry, it would make no difference at all. Because we are not here trying men upon public clamor, we are not here trying them because that bank closed or because these people lost money. We are not here trying them simply to ascertain whether or not they unlawfully misappropriated or misapplied any of the funds of that institution, that is not the question. This indictment says they did

misapply it, and that may or may not be true. That is for you to say. But suppose that you find that they did misapply this money just as the indictment charges. Suppose you have no doubt about that. You cannot convict them on that alone. That is not the point. They might be indicted for that. That would be a separate and distinct offense. What you are trying them for today, and the only thing you can convict them of is this; of knowingly exhibiting to Mr. Vreedenberg on the fourteenth of last February a false paper described in this indictment. So that it makes no difference whether they embezzled this money, or misapplied it, or that the bank failed or anything else. They may be guilty of a dozen crimes. I don't know whether they are or not. We have not got any concern with that. If they are indicted for it they will be tried, or if they are not guilty of them they will not be indicted for it.

All that we have concern with in this case is the fact of whether or not these men, or either of them, did on the 14th day of February exhibit this false paper to Vreedenberg with intent to deceive him as to the condition of the bank; because, as the law says, anybody who does that, "Every director, officer, agent or clerk of any trust company, who wilfully and knowingly exhibits any false paper with intent to deceive any person authorized to examine as to the condition of such trust company is guilty of a high misdemeanor."

139 A man may present a paper to the bank examiner which is absolutely false and yet he won't be punishable for that unless he knew it was false and presented it for the purpose of deceiving the bank examiner.

In the discussion on a motion to direct a verdict some remarks were made by the Court as to the guilt of one of these defendants, or as to the exhibiting of this false paper, and counsel called the Court's attention to that afterwards and took an exception. I want to say to you again, gentlemen, that whatever the Court said at that time should have no weight whatever with you. It was not said as an expression of opinion by the Court as to the guilt or innocence of Cornell. It was simply a remark made upon the basis of a motion made for the direction of a verdict in favor of the other person and was not intended and ought not to be at all prejudicial to Cornell in any way at all.

Now, gentlemen, was this paper false? In the first place, the paper charged in the indictment certifies in effect that a special meeting of the Board of Directors of this Company was held at the office of the Company on Monday, February 9th, 1903. There were present the following directors, George F. Kroehl, S. A. Patterson, G. B. M. Harvey, A. C. Twining, D. C. Cornell.

Among other things appears a resolution of this Company to buy 381 shares of the stock of the First National Bank at $44,875, which was adopted.

Now, was that meeting held or not.

That paper says that at this meeting were present among others, Patterson, Twining and Cornell.

Mr. Patterson has gone upon the stand and has testified that there was no such meeting to his knowledge; that he was not present at

any such meeting; that he had no notice of any such meeting and that he never acquiesced, as I understand, in any way, in the passage of a resolution for the purchase of this stock.

Now, Twining and Cornell, this paper says were present. They are here in Court and have seen this paper offered in evidence and they know that this paper says that they were the two men, or two of the men, who were present. Neither of them has gone
140 upon the stand to deny that they were present, or to show that the meeting was held.

Now, it is not necessary for these men to prove their innocence. It is not necessary for them to prove that this meeting was held. But the fact that they stay off the stand, having heard testimony which might be prejudicial to them, without availing themselves of the right to go upon the stand and contradict it, is sometimes a matter of significance.

Now, of course in this action, I do not see how that can have much weight, because these men deny that they exhibited the papr, and if one of these men exhibited the paper and the other did not, I do not see how you could say that the person who claims he did not exhibit the paper would be under any obligation at all to go upon the stand, Neither is under any obligation. It is simply a right they have to go upon the stand, and, consequently the fact that they do not go upon the stand to contradict this statement in the minutes, they both denying through their counsel and through their plea, that they exhibited the paper, I do not see that that can be taken as at all prejudicial to either of them. They simply have the right to go upon the stand and they have not availed themselves of it, and it may be that there is no necessity for them to go there. I leave that entirely to you.

Now, if the meeting was not held, of course there is no such resolution justifying the purchase of this stock, it could not have been passed. And, gentlemen, if that meeting was never held, and if you find these men knew it had not been held, and if you believe that in order to cover up the use of $44,875 of the funds of that corporation, these people, or either of them resorted to the use of the books, making false minutes of the institution and presenting them on the day mentioned in the indictment to the bank examiner for the purpose of covering up this transaction and justifying them, if you believe that beyond all reasonable doubt, I don't care how important it is, these men should be acquitted if there is any doubt about it, and I don't care how important it is that you should not be influenced by public clamor, nevertheless, if they did that and you have no doubt about it, there is no question as to what your course
141 ought to be, they should be convicted. There is no question about that. It is too important a matter to be trifled with. They must not be convicted upon prejudice, nor ought they to be protected by sympathy or anything else, if they are guilty. The public has an interest in this matter, to see that business is properly done by these institutions, you are here to convict the guilty and

acquit every person placed on trial concerning whose guilt you have reasonable doubt.

Now, if the testimony of the state is true, this paper was a false paper. And there is no dispute, as I recall it, there is no testimony as I recall, excepting as you may find testimony on behalf of the state.

You then proceed to the next question. Was this paper exhibited? Now, the State says it was exhibited. Now, I think you can safely take this, and I shall so charge you, as an illustration of exhibit. It is not necessary that these defendants should have opened this book of minutes in which this paper is said to have been contained, lay down the book, take out the paper, and read it to Mr. Vreedenburg and explain to him. That is not necessary. All that is necessary under the term exhibition as used in the statute and in this indictment is this: that these men shall have designedly and purposely caused this paper, either by themselves or through somebody else, or in some other way, to reach the hands and custody and be subject to the inspection of Vreedenburg for the purpose of deceiving him on the 14th of last February.

If it be true that either one or two of these men told Vreedenberg on the day in question that there were minutes of this meeting and that he would find them in such and such a book, telling him where that book was, and if Vreedenberg went in and got that paper out of the book without their bringing it out to him, but they telling him where he could find it and seeing him go in and get it, that would be exhibition. That would be an exhibition of the paper. Of course, that is not the evidence in this case. The evidence as to that is that Mr. Vreedenberg went to the bank and looked over the item on one of the cash books as I recall it, he wanted to know the authority for the purchase of this stock, and one or the other of these defendants, they either both being present or simply
142 Cornell present and of that I shall speak in a moment, told him it was done by virtue of an order of a resolution of the Board of Directors.

Now, I do not undertake to quote the exact language. You must recall that, and the book was produced, as I recall it, by Cornell, and the paper was found in that book. Now, gentlemen, if that is so, the man who told him that, exhibited to him those minutes in the contemplation of that statute.

Otherwise you make the statute a farce. If he told him it was in this book and produced the book to him, and told him this was what authority they had for it, that was exhibiting the false minutes by him.

Of course, it is for you to say what was his object. If he did it for any other purpose except to deceive him, he would not be guilty. He must have exhibited it for the purpose of deceiving him as to the condition of the bank.

You must recall the evidence, what occurred there that morning. Some of the evidence has been taken down and it has been discussed here in your presence.

Of course, what Twining said on the 16th or afterwards, might and might not show guilty knowledge. Might tend to make you believe that the money had been misappropriated. But that is not evidence sufficient to convict him. Because before you can convict either of them you must be satisfied that they not only misappropriated the money, but that on the 14th of February, Saturday, not on Monday or Tuesday, but on the 14th of February they knowingly exhibited and produced this false paper or procured it to be shown to Vreedenberg with intent to deceive him as to the condition of the institution.

Now, Mr. Vreedenberg says that both of these people were at this institution on Saturday and he was asked this question:

"Q. Did you have any further conversation with them," (referring to these two defendants) "or how did you find this paper exhibit? That is, this alleged false paper."

"A. On Saturday, the 14th——"

"The COURT: Where, under what circumstances, Mr. Prosecutor, did he find it? Who was present?

"The WITNESS: I asked for the authority under which this stock was purchased."

143 "The COURT: You asked who, Mr. Twining?"

"The WITNESS: Yes, and Cornell, and he told me that it had been purchased by authority of the board of directors. I then asked for the minute book and the minute book was handed down to me."

Now, you see, gentlemen, at that time, both of these men were present if Vreedenberg is correct in his testimony. But suppose they were both present, and only one exhibited the book. The one who exhibited it would be guilty if he exhibited it for the purpose to which I have alluded, and the other would not be guilty *wg* unless he knew that the book was being exhibited for the purpose of deceiving the bank examiner. They were both present in the bank, the condition of the bank was under discussion. The purchase of this stock was under discussion. Vreedenberg says he was talking with both of them. But then you notice that he proceeds right after that to speak of a person in the singular, and he says "he" told me that it had been purchased by authority of the board of directors.

Now, Mr. Vreedenberg will not say positively that Twining was present at the time of the exhibition or the producing of this book with the alleged false minutes in it. He had been there, they had been discussing this bank, they had been discussing the purchase of the stock, and you might say, "Well, the book was exhibited by reason of the joint act and the consent of these two people, but you have got no right to guess about it; you have got to say that you are satisfied beyond a reasonable doubt that if Cornell produced the book not simply that Cornell was guilty, but that Twining knew that it was being produced or acquiesced in it. It is not necessary for both of them to see the book and both of them to do the talking. If you are satisfied that one produced the false minutes and that with the consent of the other, he being present, and by his silence

acquiescing in it, with full knowledge that it was being produced and exhibited for the purpose of deceiving the examiner, Twining is just as guilty as Cornell.

If you are satisfied beyond a reasonable doubt of that. That is the point for you to be satisfied about.

You must remember the testimony of Vreedenberg upon the subject, how he has testified, and it is for you to say whether
144 or not you think it is proven beyond a reasonable doubt that the book was exhibited for this improper purpose, knowledge of both of these defendants.

Now, you see, gentlemen, you get where it is not a question of law, but a question of fact. It is for you as intelligent men to say whether or not from all the circumstances of the case as shown by the evidence, the situation of the people there present, whether or not this was exhibited with the knowledge of both of these defendants.

I don't know that I can make that any plainer, gentlemen, if I should talk a long time about it.

On this part of the case you must examine the evidence if you believe beyond a reasonable doubt that Cornell actually directed the attention of Vreedenberg to this alleged false paper—of course, with knowledge of its falsity, and with intent to deceive him as to the condition of the bank, he would be guilty. It is for you to say, whether he actually directed Vreedenberg's attention to the false minutes. Because, as I recall it,—you must rely upon your own recollection though—he told Vreedenberg that the last minutes had not been written up.

Now, gentlemen, if you believe that that is so; if you believe this testimony that Cornell did direct this man's attention to it—Cornell has sat here and heard that testimony and not denied it—nobody could misunderstand the import of that testimony, it was a direct accusation made against him of his guilt—if you believe that testimony beyond a reasonable doubt, Cornell is guilty. And yet he has sat here and not gone upon the stand to deny it. He was not called upon to go upon the stand and deny it, but he did not go upon the stand and deny it, and it is for you to take that into consideration.

Now, Twining has also sat here and heard this testimony, but you will observe there is this distinction as to the conduct of these two men in this respect: the accusation against Cornell was specific by Vreedenberg. It is rather inferential if at all, against Twining, and he might say—it is for you to say whether he might say, "Well, I don't think the accusation against me is made with such a degree of certainty as to require me to deny it, and I shall not; no-
145 body will think it strange if I do not go upon the stand to deny it, because Vreedenberg is uncertain as to whether I was there, he won't swear that I was there." So consequently the fact that Twining did not go upon the stand can have no significance at all.

You may say that the fact that Cornell did not go upon the stand has no significance. You may say so, because the circumstances

may be such that there should be no inference drawn of guilt or anything of that kind from the fact that he did not go upon the stand. Because a man does not go upon the stand you are not necessarily justified in drawing an inference of guilt. But you have a right to consider the fact that he does not go upon the stand where a direct accusation is made against him.

You may, gentlemen, under the evidence in this case, either convict both of these men, or you may acquit both, and you may convict one and acquit the other, as you think the evidence warrants; you are not obliged to convict both, you are not obliged to acquit both. You can convict both or acquit both. You can acquit one and convict the other, according to the evidence.

Mr. ARROWSMITH: I have not formulated any requests to charge, but no doubt your Honor will charge this request:

I ask your Honor to charge the Jury that any testimony given by Cornell in the absence of Twining is not binding upon Twining and should not be considered by them upon the guilt of Twining.

The COURT: I so charge you gentlemen, any testimony given as to statements made by Twining in the absence of Cornell, must not affect Cornell.

Mr. ARROWSMITH: I take a general exception to the whole charge.

Mr. HAWKINS: I except to what the Court said about the defendants not going upon the stand, both times the Court mentioned that.

Exception allowed defendants.

I except to what the Court said about the amount of $45,000, or whatever the sum was, I want an exception to what was said following that.

I also except to the illustration of the Court as to what exhibiting means.

146 I also except to that part of the charge of the Court where the Court said it was not necessary they should take up the paper, etc.

I further except to what the Court said following this; if they told Vreedenberg that there were minutes and told Vreedenberg where to find them and Vreedenberg got them, that would be an exhibition of the minutes on the part of the defendants.

I also except to the charge of the Court where the Court charges that Twining would not be guilty if Cornell exhibited the book unless he acquiesced and knew that it was produced, it must be with the consent of the other, etc., what the court said about that——

I also take a general exception to the charge.

(The Jury then retired).

147 Monmouth Court of Quarter Sessions.

THE STATE OF NEW JERSEY, Defendant in Error,

*vs.*

ALBERT C. TWINING and DAVID C. CORNELL, Plaintiffs in Error.

I, the undersigned, presiding judge of the above entitled Court, hereby certify that the foregoing matter is the entire record of the

proceedings had upon the trial of the cause wherein Albert C. Twining and David C. Cornell were defendants, under a certain indictment for exhibiting false minutes, which said indictment was tried in the Court aforesaid on the first day of March last past.

Dated this seventeenth day of March, nineteen hundred and four.

WILBUR A. HEISLEY,
*Presiding Judge.*

148 Monmouth Court of Quarter Sessions.

THE STATE OF NEW JERSEY, Defendant in Error.
*vs.*
ALBERT C. TWINING and DAVID C. CORNELL, Plaintiffs in Error.

The Honorable Wilbur A. Heisley, presiding judge of the Monmouth Court of Quarter Sessions, having ceased to hold office as such presiding judge of said court, without having sealed the exceptions, had, taken and allowed upon the trial of the above named Albert C. Twining and David C. Cornell, under indictment for exhibiting false minutes, said indictment having been tried before the said Wilbur A. Heisley on the first day of March, nineteen hundred and four, and the said Wilbur A. Heisley declining to sign the said exceptions so taken and allowed before him at and under the trial of the said indictment, the parties therefore do state and agree to the bills of exceptions as provided by the statute, as follows:

Stating and agreeing hereby that the said exceptions are and were the exceptions that were had, taken and allowed on the trial of the said indictment before the said Wilbur A. Heisley, then presiding judge of said court, although the same were not actually signed by the said Wilbur A. Heisley, judge as aforesaid, because of his ceasing to hold office as such judge as aforesaid, that is to say:

The defendants moved to quash the indictment on the grounds stated on pages 17 to 24 inclusive, of the printed case, namely:

149 That the indictment charged a violation of the 17th section of the act entitled "An Act concerning trust companies," (Revision of 1899); that this section was in contravention of Article 4, Section 7, Paragraph 4 of the Constitution of New Jersey; that the indictment was bad for duplicity; that the indictment was uncertain, so that no crime was charged thereby and so that the defendants were not notified of the crime they were charged with; that the indictment did not show that the person to whom the paper mentioned in the indictment was exhibited, was authorized to examine as to the condition of the bank that the defendants could be indicted only for violation of the said 17th section of the act aforesaid; that the things alleged in the indictment, in reference to the false minutes, did not amount to a crime under the law prior to eighteen hundred and ninety-nine; that the indictment did not allege that the company therein named was a trust company created under the act referred to—and upon the refusal to quash the indictment on

these grounds and the ones referred to, an exception was prayed and allowed by the judge of the above entitled court.

That the judge before whom the said indictment was tried, held that the first portion of the indictment was a mere recital of a part of the facts which the defendants brought about to misrepresent to the person authorized to examine the company, by presenting the paper which in the indictment is alleged to have been a false minute; that it was competent to show, if the state could, the misapplication of funds, as specified in the indictment, simply for the purpose of following it up then with proof showing that they tried to deceive the Banking Department or the person appointed to examine the company, by the use of an alleged false minute; that that was not a separate and distinct crime—against the objection of the defendants; and an exception to the said ruling of the said judge was prayed and allowed by him.

That the said judge before whom the said indictment was tried, allowed Larue R. Vredenburgh, a material witness on the part of the State, to testify as to his appointment as an officer of the Department of Banking and Insurance, without presenting any certificate of his appointment, or other proof, except his own statement
150 that he was examiner of the Department of Banking and Insurance—against the objection of the defendants; and an exception to the said ruling of the said judge was prayed and allowed by him.

That the said judge before whom the said indictment was tried, allowed the witness Larue R. Vredenburgh, to prove by his own statement, without any written or adequate proof in corroboration or support thereof, that he was an authorized examiner of the Department of Banking and Insurance of the State of New Jersey—against the objection of the defendants; and an exception to the said ruling of the said judge was prayed and allowed by him.

That the said judge before whom the said indictment was tried allowed the said witness Larue R. Vredenburgh, to prove by his own statement, without any adequate or other proof in support thereof, that at the time mentioned in the indictment he was exercising authority as an examiner of the Department of Banking and Insurance of the State of New Jersey—against the objection of the defendants; and an exception to the said ruling of the said judge was prayed and allowed by him.

That the said judge before whom the said indictment was tried, allowed the witness Larue R. Vrendenburgh, to state that his attention was directed to the entries on pages 110 and 111 of the State's Exhibit No. 3, without stating by whom his attention was thereto directed—against the objection of the defendants; and an exception to the said rulings of the said judge was prayed and allowed by him.

That the said judge before whom the said indictment was tried, admitted a conversation had in February, nineteen hundred and three, between the witness Larue R. Vredenburgh, and the defendant David C. Cornell, in relation to the items of debit and credit appearing on pages 110 and 111 of State's Exhibit No. 3—against the

objection of the defendants; and an exception to the said ruling of the said judge was prayed and allowed by him.

That the said judge before whom the said indictment was tried admitted a conversation between the witness Larue R. Vredenburgh, and the defendant Albert C. Twining, on February fourteenth, nineteen hundred and three, in regard to the case of
151 the State against the said defendants against the objection of the defendants; and an exception to the said ruling of the said judge was prayed and allowed by him.

That the said judge before whom the said indictment was tried, admitted a conversation between the witness Larue R. Vredenburgh, and the defendant Albert C. Twining, on the sixteenth day of February, nineteen hundred and three, in regard to the case of the State against the said defendants—against the objection of the defendants; and an exception to the said ruling of the said judge was prayed and allowed by him.

That the said judge before whom the said indictment was tried, admitted a conversation in February, nineteen hundred and three, between the witness Larue R. Vredenburgh, and David C. Cornell, in connection with Exhibit 7 and in connection with the transaction on pages 110 and 111 of the minutes of meeting, subsequent to the delivery of the statements to the said witness Larue R. Vredenburgh, and the conversations above referred to—against the objection of the defendants; and an exception to the said ruling of the said judge was prayed and allowed by him.

That the said judge before whom the said indictment was tried, admitted to be marked for identification in evidence, State's Exhibit No. 8, although the said Exhibit was not mentioned in or connected with the charge laid in the indictment—against the objection of the defendants; and an exception to the said ruling of the said judge was prayed and allowed by him.

That the said judge before whom the said indictment was tried, admitted a conversation between the witness Larue R. Vredenburgh and Albert C. Twining on February fourteenth, nineteen hundred and three, relative to the entry on page 110 in States's Exhibit 2, concerning a credit of the North American Trust Company of $35,048.77—against the objection of the defendants; and an exception to the said ruling of the said judge was prayed and allowed by him.

That the said judge before whom the said indictment was tried, admitted a conversation between the witness Larue R. Vredenburgh, and David C. Cornell, on the seventeenth and eighteenth of February, nineteen hundred and three, and a conversation with
152 Mr. Patterson by the said David C. Cornell, in the presence of the said Larue R. Vredenburgh, concerning whether the said Patterson was present at a meeting referred to in certain minutes, a meeting at which a resolution of authority had been passed to purchase stock of the First National Bank—against the objection of the defendants; and an exception to the said ruling of the said judge was prayed and allowed by him.

That the said judge before whom the said indictment was tried,

allowed the said witness Larue R. Vredenburgh, to testify as to the capacity in which he was acting, and that he disclosed the same to the defendants, and that he had been at the Trust Company before in the capacity of bank examiner, while the defendants had been acting as officers of the institution—against the objection of the defendants; and an exception to the said ruling of the said judge was prayed and allowed by him.

That the said judge before whom the said indictment was tried, permitted the witness Larue R. Vredenburgh, to testify that he knew that $44,875 of the Trust Company's money had been used to pay for some of the First National Bank stock—against the objection of the defendants; and an exception to the said ruling of the said judge was prayed and allowed by him.

That the said judge before whom the said indictment was tried, permitted the witness Larue R. Vredenburgh, to testify how $10,000 was paid on the fourth of February, nineteen hundred and three, without producing the checks of payment—against the objection of the defendants; and an exception to the said ruling of the said judge was prayed and allowed by him.

That the said judge before whom the said indictment was tried, permitted the witness, R. A. Tusting, to state that the statements contained in the paper marked Exhibit 8, were true—the same not relating to the charge laid in the indictment—against the objection of the defendants; and an exception to the said ruling of the said judge was prayed and allowed by him.

That the said judge before whom the said indictment was tried, permitted the witness R. A. Tusting, to state that the state-
153 ments contained in the paper marked Exhibit 7 were true—the same not relating to the charge laid in the indictment—against the objection of the defendants; and an exception to the said ruling of the said judge was prayed and allowed by him.

That the said judge before whom the said indictment was tried, admitted in evidence the book of minutes in which Exhibit 7 was contained—against the objection of the defendants; and an exception to the said ruling of the said judge was prayed and allowed by him.

That the said judge before whom the said indictment was tried, admitted in evidence Exhibit No. 8, being corrected copy of minutes—the same not being the minutes mentioned in the indictment—against the objection of the defendants; and an exception to the said ruling of the said judge was prayed and allowed by him.

That the said judge before whom the said indictment was tried, admitted in evidence Exhibit No. 9, an affidavit made by David C. Cornell before John F. Hawkins—against the objection of the defendants; and an exception to the said ruling of the said judge was prayed and allowed by him.

That the said judge before whom the said indictment was tried, admitted in evidence a draft (Exhibit 16) for $35,048.77—against the objection of the defendants; and an exception to the said ruling of the said judge was prayed and allowed by him.

That the said judge before whom the said indictment was tried,

permitted Annie E. Rittenhouse, a witnes, to testify as to the handwriting of the items on page 110 of book marked "No. 3 for identification,"—against the objection of the defendants; and an exception to the said ruling of the said judge was prayed and allowed by him.

That the said judge before whom the said indictment was tried, admitted in evidence the two items on Exhibit No. 3, the same being prejudicial to the defendant David C. Cornell—against the objection of the defendants; and an exception to the said ruling of the said judge was prayed and allowed by him.

That the said judge before whom the said indictment was tried, permitted the witness Samuel A. Patterson, to testify that on
154 or about the fourteenth day of February, nineteen hundred and three, he had a conversation with the defendant David C. Cornell, concerning Exhibit No. 7, and permitted the said witness to testify to the said conversation—against the objection of the defendants; and an exception to the said ruling of the said judge was prayed and allowed by him.

That the said judge before whom the said indictment was tried, stated that the defendant David C. Cornell, exhibited the minutes mentioned in the indictment, and adjudicated the matter—and prejudiced the defendants before the jury by stating that the said defendant David C. Cornell, had exhibited the said minutes—against the objection of the defendants; and an exception to the said action of the said judge was prayed and allowed by him.

That the said judge before whom the said indictment was tried, allowed the witness Larue R. Vredenburgh, to be recalled as a witness after the State had closed and made its case against the said defendants—against the objection of the defendants; and an exception to the said ruling of the said judge was prayed and allowed by him.

That the said judge before whom the said indictment was tried, refused to instruct the jury to acquit the defendants, or either of them, although regularly moved thereunto, and although the evidence did not show that the said David C. Cornell had ever exhibited the paper or minutes in question to the said witness Vredenburgh, and although the evidence did not prove the defendants or either of them to have been guilty of any crime—against the objection of the defendants; and on exception to the said refusal of the said judge was prayed and allowed by him.

That the said judge before whom the said indictment was tried, charged the jury as follows:

HEISLEY, *J.*:

Gentlemen of the Jury; this indictment is founded upon the 17th Section of the Trust Company Act of this State, passed at the session of the legislature of 1899. You will take the indictment with you and find what the charge made by the State is as expressed in legal language or verbiage.

In effect it is this; that there was a trust company existing
155 at Asbury Park of which these two defendants were directors, Twining being the president, and Cornell the treasurer.

That there had been a large amount of money misapplied, some thirty or forty thousand dollars, of the funds of that trust company, and to deceive the Banking Department of the State, that is, the representative of that department who had the power to make an examination as to the condition of that trust company, they handed to this examiner, Mr. Vreedenberg, or exhibited to him, in the language of the statute, a paper which they said to Vreedenberg was the minutes of a meeting of the Board of Directors of that institution held on February 9th, at which the purchase of 381 shares of the capital stock of the First National Bank of Asbury Park was authorized.

This money which was misapplied, it is claimed by the state, was misapplied in the purchase of that stock.

Now, I want to say to you, at the outset, that in this case, as in all cases, the law presumes these defendants to be innocent. That is unquestionably the law. That it is the duty of the state to prove them guilty beyond all reasonable doubt. It is not the duty of a defendant in any criminal proceeding to prove his innocence. The State must prove his guilt beyond all reasonable doubt.

If, after hearing all this evidence and considering it, there remains in your mind a doubt as to any essential fact, any fact essential towards the completion of this crime, you should resolve that doubt in favor of the defendant or defendants, and acquit.

As to the weight of evidence, gentlemen, and as to what are facts and what are not, what facts the testimony tends to prove or disprove, you, and not the Court, are the absolute judge. It makes no difference what the Court may think about the guilt or innocence of these defendants. If you felt satisfied that the Court felt that these men were absolutely guilty, you would not be justified in convicting them unless you also believed beyond a reasonable doubt that they were guilty. I do not mean to say now in any way what I may think of the case, but the fact that the Court may believe a person guilty, ought to have no weight at all upon the jury. You are sworn,
156 gentlemen, to exercise your judgment and you are to exercise it simply as it may be influenced by the evidence.

Now, this is a serious charge made against these men. There is no question but that banks and trust companies ought to be operated honestly. There should be no doubt about that. The legislature, in order to protect the people doing business with those institutions, has devised a means of having these institutions examined. It makes it the duty of the officers of the institution to give the examiner certain information and the law says that when the bank examiner comes around to examine the institution, if any officer of that institution exhibits to him a false paper or makes a false statement with intent to deceive him as to the condition of the bank, he is guilty of a high misdemeanor, and may, in the discretion of the Court before which he is convicted, be either fined or imprisoned, and imprisoned not more than seven years, but it may be seven years if the Court in its discretion deems that proper.

It is sufficient to say, gentlemen, that if these men misappropriated the funds of that bank or that institution for the purchase of this

stock or in any other way, and then undertook to deceive the bank examiner, as this indictment charges they did, and in that manner deceive him, it is of the utmost importance that the men who did that should be convicted. On the other hand, if there is any reasonable doubt about the guilt of these men, or either of them, as to their knowingly exhibiting a false report to this man with intent to deceive him, they should be acquitted.

Now, I am free to say that in this county there has been considerable talk and discussion about this institution at Asbury Park, and yet I want to say to you, there are over eighty thousand people in this county, and if I was serving upon this jury, and if I had a reasonable doubt as to the guilt of either one of these men, in the exercise of my solemn duty, under my oath, I would acquit them, even if it make the whole eighty thousand people in the country angry, it would make no difference at all. Because we are not here trying men upon public clamor, we are not here trying them be-
157 cause that bank closed or because these people lost money. We are not here trying them simply to ascertain whether or not they unlawfully misappropriated or misapplied any of the funds of that institution, that is not the question. This indictment says they did misapply it, and that may or may not be true. That is for you to say. But suppose that you find that they did misapply this money just as the indictment charges. Suppose you have no doubt about that. You cannot convict them on that alone. That is not the point. They might be indicted for that. That would be a separate and a distinct offense. What you are trying them for today, and the only thing you can convict them of is this; of knowingly exhibiting to Mr. Vreedenberg on the fourteenth of last February a false paper described in this indictment. So that it makes no difference whether they embezzled this money, or misapplied it, or that the bank failed or anything else. They may be guilty of a dozen crimes. I don't know whether they are or not. We have not got any concern with that. If they are indicted for it they will be tried, or if they are not guilty of them they will not be indicted for it.

All that we have concern with in this case is the fact of whether or not these men, or either of them, did on the 14th day of February exhibit this false paper to Vreedenburg with intent to deceive him as to the condition of the bank; because, as the law says, any body who does that, "Every director, officer, agent or clerk of any trust company, who wilfully and knowingly exhibits any false paper with intent to deceive any person authorized to examine as to the condition of such trust company is guilty of a high misdemeanor."

A man may present a paper to the bank examiner which is absolutely false and yet he won't be punishable for that unless he knew it was false and presented it for the purpose of deceiving the bank examiner.

In the discussion on a motion to direct a verdict some remarks were made by the Court as to the guilt of one of these defendants, or as to the exhibiting of this false paper, and counsel called the Court's attention to that afterwards and took an exception. I want

to say to you again, gentlemen, that whatever the Court said
158 at that time should have no weight whatever with you. It was not said as an expression of opinion by the Court as to the guilt or innocence of Cornell. It was simply a remark made upon the basis of a motion made for the direction of a verdict in favor of the other person and was not intended and ought not to be prejudicial to Cornell in any way at all.

Now, gentlemen, was this paper false? In the first place, the paper charged in the indictment certifies in effect that a special meeting of the Board of Directors of this Company was held at the office of the Company on Monday, February 9th, 1903. There were present the following directors, George F. Kroehl, S. A. Patterson, G. B. M. Harvey, A. C. Twining, D. C. Cornell.

Among other things appears a resolution of this Company to buy 381 shares of the stock of the First National Bank at $44,875, which was adopted.

Now, was that meeting held or not.

That paper says that at this meeting were present among others, Patterson, Twining and Cornell.

Mr. Patterson has gone upon the stand and has testified that there was no such meeting to his knowledge; that he was not present at any such meeting; that he had no notice of any such meeting and that he never acquiesced, as I understand, in any way, in the passage of a resolution for the purchase of this stock.

Now, Twining and Cornell, this paper says were present. They are here in Court and have seen this paper offered in evidence and they know that this paper says that they were the two men, or two of the men, who were present. Neither of them has gone upon the stand to deny that they were present, or to show that the meeting was held.

Now, it is not necessary for these men to prove their innocence. It is not necessary for them to prove that this meeting was held. But the fact that they stay off the stand, having heard testimony which might be prejudicial to them, without availing themselves of the right to go upon the stand and contradict it, is sometimes a matter of significance.

Now, of course in this action, I do not see how that can have much weight, because these men deny that they exhibited
159 the paper, and if one of these men exhibited the paper and the other did not, I do not see how you could say that the person who claims he did not exhibit the paper would be under any obligation at all to go upon the stand. Neither is under any obligation. It is simply a right they have to go upon the stand, and, consequently the fact that they do not go upon the stand to contradict this statement in the minutes, they both denying through their counsel and through their plea, that they exhibited the paper, I do not see that that can be taken as at all prejudicial to either of them. They simply have the right to go upon the stand and they have not availed themselves of it, and it may be that there is no necessity for them to go there. I leave that entirely to you.

Now, if the meeting was not held, of course there is no such reso-

lution justifying the purchase of this stock, it could not have been passed. And, gentlemen, if that meeting was never held, and if you find these men knew it had not been held, and if you believe that in order to cover up the use of $44,875 of the funds of that corporation, these people, or either of them resorted to the use of the books, making false minutes of the institution and presenting them on the day mentioned in the indictment to the bank examiner for the purpose of covering up this transaction and justifying them, if you believe that beyond all reasonable doubt, I don't care how important it is, these men should be acquitted if there is any doubt about it, and I don't care how important it is that you should not be influenced by public clamor, nevertheless, if they did that and you have no doubt about it, there is no question as to what your course ought to be, they should be convicted. There is no question about that. It is too important a matter to be trifled with. They must not be convicted upon prejudice, nor ought they to be protected by sympathy or anything else, if they are guilty. The public has an interest in this matter, to see that business is properly done by these institutions, you are here to convict the guilty and acquit every person placed on trial concerning whose guilt you have reasonable doubt.

Now, if the testimony of the state is true, this paper was a false paper. And there is no dispute, as I recall it, there is no
160 testimony as I recall, excepting as you may find testimony on behalf of the state.

You then proceed to the next question. Was this paper exhibited? Now, the State says it was exhibited. Now, I think you can safely take this, and I shall so charge you, as an illustration of exhibit. It is not necessary that these defendants should have opened this book of minutes in which this paper is said to have been contained, lay down the book, take out the paper, and read it to Mr. Vreedenburg and explain to him. That is not necessary. All that is necessary under the term exhibition as used in the statute and in this indictment is this: that these men shall have designedly and purposely caused this paper, either by themselves or through somebody else, or in some other way, to reach the hands and custody and be subject to the inspection of Vreedenburg for the purpose of deceiving him on the 14th of last February.

If it be true that either one or two of these men told Vreedenburg on the day in question that there were minutes of this meeting and that he would find them in such and such a book, telling him where that book was, and if Vreedenburg went in and got that paper out of the book without their bringing it out to him, but they telling him where he could find it and seeing him go in and get it, that would be exhibition. That would be an exhibition of the paper. Of course, that is not the evidence in this case. The evidence as to that is that Mr. Vreedenburg went to the bank and looked over the item on one of the cash books as I recall it, he wanted to know the authority for the purchase of this stock, and one of the other of these defendants, they either both being present or simply Cornell present and of that I shall speak in a moment, told him it was done by virtue of an order of a resolution of the Board of Directors.

Now, I do not undertake to quote the exact language. You must recall that, and the book was produced, as I recall it, by Cornell, and the paper was found in that book. Now, gentlemen, if that is so, the man who told him that, exhibited to him those minutes in the contemplation of that statute.

Otherwise you make the statute a farce. If he told him it was in this book and produced the book to him, and told him this
161 was what authority they had for it, that was exhibiting the false minutes by him.

Of course, it is for you to say what was his object. If he did it for any other purpose except to deceive him, he would not be guilty. He must have exhibited it for the purpose of deceiving him as to the condition of the bank.

You must recall the evidence, what occurred there that morning. Some of the evidence has been taken down and it has been discussed here in your presence.

Of course, what Twining said on the 16th or afterwards, might and might not show guilty knowledge. Might tend to make you believe that the money had been misappropriated. But that is not evidence sufficient to convict him. Because before you can convict either of them you must be satisfied that they not only misappropriated the money, but that on the 14th of February, Saturday, not on Monday or Tuesday, but on the 14th of February they knowingly exhibited and produced this false paper or procured it to be shown to Vreedenburg with intent to deceive him as to the condition of the institution.

Now, Mr. Vreedenburg says that both of these people were at this institution on Saturday and he was asked this question:

"Q. Did you have any further conversation with them," (referring to these two defendants) "or how did you find this paper exhibit? That is, this alleged false paper." "A. On Saturday, the 14th——"

"The COURT: Where, under what circumstances, Mr. Prosecutor, did he find it? Who was present?

"The WITNESS: I asked for the authority under which this stock was purchased."

"The COURT: You asked who, Mr. Twining?"

"The WITNESS: Yes, and Cornell, and he told me that it had been purchased by authority of the board of directors. I then asked for the minute book and the minute book was handed down to me."

Now, you see, gentlemen, at that time both of these men were present, if Vreedenburg is correct in his testimony. But suppose they were both present, and only one exhibited the book.
162 The one who exhibited it would be guilty if he exhibited for the purpose to which I have alluded, and the other would not be guilty unless he knew that the book was being exhibited for the purpose of deceiving the bank examiner. They were both present in the bank, the condition of the bank was under discussion. The purchase of this stock was under discussion. Vreedenburg says he was talking with both of them. But then you notice that he proceeds right after that to speak of a person in the singular, and he says "he"

told me that it had been purchased by authority of the board of directors.

Now, Mr. Vreedenburg will not say positively that Twining was present at the time of the exhibition or the producing of this book with the alleged false minutes in it. He had been there, they had been discussing this bank, they had been discussing the purchase of the stock, and you might say, "Well, the book was exhibited by reason of the joint act and the consent of these two people, but you have got no right to guess about it; you have got to say that you are satisfied beyond a reasonable doubt that if Cornell produced the book not simply that Cornell was guilty, but that Twining knew that it was being produced or acquiesced in it. It is not necessary for both of them to see the book and both of them to do the talking. If you are satisfied that one produced the false minutes and that with the consent of the other, he being present, and by his silence acquiescing in it, with full knowledge that it was being produced and exhibited for the purpose of deceiving the examiner, Twining is just as guilty as Cornell.

If you are satisfied beyond a reasonable doubt of that. That is the point for you to be satisfied about.

You must remember the testimony of Vreedenburg upon the subject, how he has testified, and it is for you to say whether or not you think it is proven beyond a reasonable doubt that the book was exhibited for this improper purpose, with the knowledge of both of these defendants.

Now, you see, gentlemen, you get where it is not a question of law, but a question of fact. It is for you as intelligent men to say whether or not from all the circumstances of the case as shown by the evidence, the situation of the people there present, whether or not this was exhibited with the knowledge of both of these defendants.

163 I don't know that I can make that any plainer, gentlemen, if I should talk a long time about it.

On this part of the case you must examine the evidence if you believe beyond a reasonable doubt that Cornell actually directed the attention of Vreedenberg to this alleged false paper—of course, with knowledge of its falsity, and with intent to deceive him as to the condition of the bank, he would be guilty. It is for you to say, whether he actually directed Vreedenberg's attention to the false minutes. Because, as I recall it,—you must rely upon your own recollection though—he told Vreedenberg that the last minutes had not been written up.

Now, gentlemen, if you believe that that is so; if you believe this testimony that Cornell did direct this man's attention to it—Cornell has sat here and heard that testimony and not denied it—nobody could misunderstand the import of that testimony, it was a direct accusation made against him of his guilt—if you believe that testimony beyond a reasonable doubt, Cornell is guilty. And yet he has sat here and not gone upon the stand to deny it. He was not called upon to go upon the stand and deny it, but he did not go upon the stand and deny it, and it is for you to take that into consideration.

Now, Twining has also sat here and heard this testimony, but you will observe there is this distinction as to the conduct of these two men in this respect; the accusation against Cornell was specific by Vreedenberg. It is rather inferential if at all, against Twining, and he might say—it is for you to say whether he might say, "Well, I don't think the accusation against me is made with such a degree of certainty as to require me to deny it, and I shall not; nobody will think it strange if I do not go upon the stand to deny it, because Vreedenberg is uncertain as to whether I was there; he won't swear that I was there." So consequently the fact that Twining did not go upon the stand can have no significance at all.

You must say that the fact that Cornell did not go upon the stand has no significance. You may say so, because the circumstances may be such that there should be no inference drawn of guilt or
164 anything of that kind from the fact that he did not go upon the stand. Because a man does not go upon the stand you are not necessarily justified in drawing an inference of guilt. But you have a right to consider the fact that he does not go upon the stand where a direct accusation is made against him.

You may, gentlemen, under the evidence in this case, either convict both of these men, or you may acquit both, and you may convict one and acquit the other, as you think the evidence warrants; you are not obliged to convict both, you are not obliged to acquit both. You can convict both or acquit both. You can acquit one and convict the other, according to the evidence.

Mr. Arrowsmith: I have not formulated any requests to charge, but no doubt your Honor will charge this request:

I ask your Honor to charge the Jury that any testimony given by Cornell in the absence of Twining is not binding upon Twining and should not be considered by them upon the guilt of Twining.

The Court: I so charge you gentlemen, any testimony given as to statements made by Twining in the absence of Cornell, must not affect Cornell.

Mr. Arrowsmith: I take a general exception to the whole charge.

Mr. Hawkins: I except to what the Court said about the defendants not going upon the stand, both times the Court mentioned that.

Exception allowed defendants.

I except to what the Court said about the amount of $45,000, or whatever the sum was, I want an exception to what was said following that.

I also except to the illustration of the Court as to what exhibiting means.

I also except to that part of the charge of the Court where the Court said it was not necessary they should take up the paper, etc.

I further except to what the Court said following this; if they told Vreedenberg that there were minutes and told Vreedenberg where to find them and Vreedenberg got them, that would be an exhibition of the minutes on the part of the defendants.

165 I also except to the charge of the Court where the Court charges that Twining would not be guilty if Cornell exhibited the book unless he acquiesced and knew that it was produced, it must be with the consent of the other, etc., what the court said about that—

I also take a general exception to the charge.

(The Jury then retired.)

To which entire charge the said defendants, and each of them, prayed an exception, and the same was allowed by the said court.

HENRY M. NEVIUS,
*Prosecutor of the Pleas for Monmouth County.*

E. W. ARROWSMITH, Esq.,
*Attorney for A. C. Twining.*

VREDENBURGH, WALL & VAN WINKLE,
*Attorneys for David C. Cornell.*

166 New Jersey Supreme Court.

THE STATE OF NEW JERSEY, Defendant in Error,
*vs.*
ALBERT C. TWINING and DAVID C. CORNELL, Plaintiffs in Error.

In Error to Monmouth Quarter Sessions.

*Assignment of Errors and Specifications on Causes Relied Upon for Reversal.*

Afterwards, that is to say, on the first day of October, in the year nineteen hundred and four, in the Supreme Court of the State of New Jersey, comes the said Albert C. Twining and David C. Cornell by E. W. Arrowsmith, their attorney, and say that in the record and proceedings aforesaid, and also in the matters recited and contained in the said bill of exceptions and also in the giving of the verdict, conviction and judgment aforesaid, there is manifest error, and further that on the trial below they suffered manifest error, wrong and injury. And they humbly assign error and also specify the causes in the record of the proceedings had upon said trial returned with the writ of error upon which they rely for reversal according to the statute in such case made and provided.

(1.) The said indictment and the matters therein are not sufficient in law to convict the said Albert C. Twining and David C. Cornell or either of them of the offence declared in said indictment or of any other offence in law.

(2.) That the said Court of Quarter Sessions refused to quash said indictment when thereunto moved by counsel for the said Albert C. Twining and David C. Cornell, whereas for the reasons assigned to the said court by counsel appearing on the record of the said trial or some one of them said court should have quashed said indictment.

(3.) That upon the trial illegal evidence offered by the State was admitted against objection and exception on the part of the said Albert C. Twining and David C. Cornell and each of them as more particularly appears in the several bills of exceptions sealed upon the admission of evidence.

167 (4.) Upon said trial legal evidence offered on the part of the said Albert C. Twining and David C. Cornell and each of them was excluded as more particularly appears in the several bills of exceptions sealed upon the exclusion of evidence.

(5.) Illegal evidence admitted on said trial was allowed to stand against motion on behalf of the said Albert C. Twining and David C. Cornell and each of them to strike out the same as more particularly appears in the several bills of exceptions sealed upon refusal to strike out evidence.

(6.) Said court of Quarter Sessions refused at the close of the testimony on the part of the State and also at the close of the whole case to direct the jury to acquit the said Albert C. Twining under said indictment, although moved to do so in his behalf, and although for the reasons assigned for such motion appearing in said record of the proceedings had upon said trial or some one of said reasons a verdict of acquittal should have been directed as to said Albert C. Twining.

(7.) Said Court of Quarter Sessions refused at the close of the testimony on the part of the State and also at the close of the whole case, to direct the jury to acquit the said David C. Cornell under said indictment, although moved to do so in his behalf, and although for the reasons assigned for such motion appearing in said record of the proceedings had upon said trial or some or one of said reasons a verdict of acquittal should have been directed as to the said David C. Cornell.

8. That the said Court of Quarter Sessions refused to quash the indictment against the said defendants or either of them, although thereunto moved so to do by the said defendants and by each of them, the grounds *urged* for the quashing of the indictment on behalf of the defendants being that the indictment charged a violation of the 17th section of the act entitled "An Act concerning trust companies." (Revision of 1899); that this section was in contravention of Article IV., Section 7, Paragraph 4 of the constitution of New Jersey; that the indictment was bad for duplicity; that the indictment was uncertain so that no crime was charged thereby and so that the defendants were not notified of the crime they were charged with; that the indictment did not show that the person to whom the
168 paper mentioned in the indictment was exhibited was authorized to examine as to the condition of the bank; that the defendants could be indicted only for violation of the said 17th section of the act aforesaid; that the things alleged in the indictment in reference to the false minutes did not amount to a crime under the law prior to 1899; that the indictment did not allege that the company therein named was a trust company created under the act referred to.

9. That the court before whom the said indictment was tried held that the first portion of the indictment was a mere recital of a part of the facts which the defendants brought about to misrepresent to the person authorized to examine the bank by presenting the paper which, in the indictment, is alleged to have been a false minute; that it was competent to show, if the State could, the misapplication of funds as specified in the indictment, simply for the purpose of following it up then with proof showing that they tried to deceive the banking department or the person appointed to examine the company, by the use of an alleged false minute; that that was not a separate and distinct crime against the objection of the defendants and to their prejudice.

10. That the said Court of Quarter Sessions allowed a material witness on the part of the State, Larue R. Vredenburgh, to testify as to his appointment as an officer of the Department of Banking and Insurance without presenting any certificate of his appointment or other proof except his own statement that he was an examiner of the Department of Banking and Insurance, against the objection of the defendants and to their prejudice.

11. That the said court before whom the said indictment was tried, allowed the witness, Larue R. Vredenburgh, a material witness on the part of the State, to prove by his own statement without any written or adequate proof in corroboration or support thereof, that he was an authorized examiner of the Department of Banking and Insurance of the State of New Jersey, against the objection of the defendants and to their prejudice.

12. That the said court before whom said indictment was tried, allowed the said witness, Laurue R. Vredenburgh, to prove by his own statement, without any adequate or other proof in sup-
169 port thereof, that at the time mentioned in the indictment he was exercising authority as an examiner of the Department of Banking and Insurance of the State of New Jersey, against the objection of the defendants and to their prejudice.

13. That the said court before whom, &c., allowed the witness, Larue R. Vredenburgh, to state that his attention was directed to the entries on pages 110 and 111 of the State's Exhibit No. 3, without stating by whom his attention was thereto directed, against the objection of the defendants and to their prejudice.

14. That the said court before whom, &c., admitted a conversation had in February, 1903, between the witness, Laure R. Vredenburgh, and the defendant, David C. Cornell, in relation to the items of debit and credit appearing on pages 110 and 111 of State's Exhibit No. 3, against the objection of the defendants and to their prejudice.

15. That the said court before whom, &c., admitted a conversation between the witness, Larue R. Vredenburgh, and the defendant, Albert C. Twining, on February 14th, 1903, in regard to the case of the State against these defendants, against the objection of the defendants and to their prejudice.

16. That the said court before whom, &c., admitted a conversation between the witness, Larue R. Vredenburgh, and the defendant, Albert C. Twining, on the 16th day of February, 1903, in regard to the case of the State against said defendants, against the objection of the defendants and to their prejudice.

17. That the said court before whom, &c., admitted a conversation in February, 1903, between the witness, Larue R. Vredenburgh, and the defendant, David C. Cornell, in connection with Exhibit No. 7 and in connection with the transaction on pages 110 and 111 of the minutes of meeting subsequent to the delivery of the statements to the said witness, Larue R. Vredenburgh, and the conversation above referred to, against the objection of the defendants and to their prejudice.

18. That the said court before whom, &c., admitted to be marked

for identification and evidence State's Exhibit No. 8, although
170 the said exhibit was not mentioned in or connected with the charge laid in the indictment, against the objection of the defendants and to their prejudice.

19. That the said court before whom, &c., admitted a conversation between the witness, Larue R. Vredenburgh, and the defendant, Albert C. Twining, on February 14th, 1903, relative to the entry on page 110 in State's Exhibit No. 2, concerning a credit of the North American Trust Company of $35,048.77, against the objection of the defendants and to their prejudice.

20. That the said court before whom, &c., admitted a conversation between the witness, Larue R. Vredenburgh, and the defendant, David C. Cornell, on the 17th and 18th of February, 1903, and a conversation with Mr. Patternson by the said David C. Cornell in the presence of the said Larue R. Vredenburgh concerning whether the said Patterson was present at a meeting referred to in certain minutes, a meeting at which a resolution of authority had been passed to purchase stock of the First National Bank, against the objection of the defendants and to their prejudice.

21. That the said court before whom, &c., allowed the witness, Larue R. Vredenburgh, to testify as to the capaciy in which he was acting and that he disclosed the same to the defendants, and that he had been at the Trust Company before in the capacity of bank examiner while the defendants had been acting as officers of the institution, against the objection of the defendants and to their prejudice.

22. That the said court before whom, &c., permitted the witness, Larue R. Vredenburgh, to testify that he knew that $44,875 of the Trust Company's money had been used to pay for some of the First National Bank stock, against the objection of the defendants and to their prejudice.

23. That the said court before whom, &c., permitted the witness, Larue R. Vredenburgh, to testify how $10,000 was paid on the 14th of February, 1903, without producing the cheques of payment, against the objection of the defendants and to their prejudice.

24. That the said court before whom, &c., permitted the witness,
R. A. Tusting, to state that the statements contained in the
171 paper marked Exhibit No. 8, were true, the same not relating to the charge laid in the indictment, against the objection of the defendants and to their prejudice.

25. That the said court before whom, &c., permitted the witness, R. A. Tusting, to state that the statements contained in the paper marked Exhibit No. 7, were true, the same not relating to the charge laid in the indictment, against the objection of the defendants and to their prejudice.

26. That the said court before whom, &c., admitted in evidence the book of minutes in which Exhibit No. 7 was contained, against the objection of the defendants and to their prejudice.

27. That the said court before whom, &c., admitted in evidence Exhibit No. 8, being corrected copy of minutes, the same not being the minutes mentioned in the indictment, against the objection of the defendants and to their prejudice.

28. That the said court before whom, &c., admitted in evidence Exhibit No. 9, an affidavit made by David C. Cornell before John F. Hawkins, against the objection of the defendants and to their prejudice.

29. That the said court before whom, &c., admitted in evidence a draft (Exhibit No. 16) for $35,048.77, against the objection of the defendants and to their prejudice.

30. That the said court before whom, &c., permitted Annie E. Rittenhouse, a witness, to testify as to the handwriting of the items on page 110 of book marked No. 3 for identification, against the objection of the defendants and to their prejudice.

31. That the said court before whom, &c., admitted in evidence the two items on Exhibit No. 3, the same being prejudicial to the defendant, David C. Cornell, against the objection of the defendants and to their prejudice.

32. That the said court before whom, &c., permitted the witness, Samuel A. Patterson, to testify that on or about the 14th day of February, 1903, he had a conversation with the defendant, David C. Cornell, concerning Exhibit No. 7, and permitted the said witness to testify to the said conversation, against the objection of the defendants and to their prejudice.

33. That the said court before whom, &c., stated that the defendant, David C. Cornell, exhibited the minutes mentioned in
172 the indictment and adjudicated the charge in the indictment and prejudiced the defendants before the jury by stating that the said defendant, David C. Cornell, had exhibited said minutes, against the objection of the defendants and to their prejudice.

34. That the said court before whom, &c., allowed the witness, Larue R. Vredenburgh, to be recalled as a witness after the State had closed and made its case against the said defendants, against the objection of the defendants and to their prejudice.

35. That the said court before whom, &c., refused to instruct the jury to acquit the defendants or either of them, although regularly moved thereunto, and although the evidence did not show that the said David C. Cornell had ever exhibited the paper or minutes in question to the said witness, Larue R. Vredenburgh, and although the evidence did not prove the defendants or either of them to have been guilty of any crime, against the objection of the defendants and to their prejudice.

36. That the said court before whom, &c., erred in its charge to the jury in instructing the jury as follows:

"Now Twining and Cornell, this paper says, were present. They are here in court and have seen this paper offered in evidence, and they know that this paper says that they were the two men or two of the men who were present. Neither of them has gone upon the stand to deny that they were present, or to show that the meeting was held. Now, it is not necessary for these two men to prove their innocence. It is not necessary for them to prove that this meeting was held. But the fact that they stayed off the stand, having heard testimony which might be prejudicial to them, without availing themselves of the right to go upon the stand and contradict it, is

sometimes a matter of significance,"—to the prejudice of the defendants.

37. That the said court before whom, &c., erred in its charge to the jury as follows:

"They (the defendants) simply have the right to go upon the stand, and they have not availed themselves of it, and it may be that there is no necessity for them to go there. I leave that entirely to you"—to the prejudice of the defendants.

173 38. That the said court before whom, &c., erred in its charge to the jury as follows:

Now, gentlemen, if you believe that that is so; if you believe this testimony that Cornell did direct this man's attention to it—Cornell has sat here and heard that testimony and not denied it—nobody could misunderstand the import of that testimony, it was a direct accusation made against him of his guilt—if you believe that testimony beyond a reasonable doubt, Cornell is guilty. And yet he has sat here and not gone upon the stand to deny it. He was not called upon to go upon the stand and deny it, but he did not go upon the stand and deny it, and it is for you to take that into consideration.

Now, Twining has also sat here and heard this testimony, but you will observe there is this distinction as to the conduct of these two men in this respect: the accusation against Cornell was specific by Vreedenberg. It is rather inferential if at all, against Twining, and he might say—it is for you to say whether he might say, "Well, I don't think the accusation against me is made with such a degree of certainty as to require me to deny it, and I shall not; nobody will think it strange if I do not go upon the stand to deny it, because Vreedenberg is uncertain as to whether I was there; he won't swear that I was there." So consequently the fact that Twining did not go upon the stand can have no significance at all.

You must say that the fact that Cornell did not go upon the stand has no significance. You may say so, because the circumstances may be such that there should be no inference drawn of guilt or anything of that kind from the fact that he did not go upon the stand. Because a man does not go upon the stand you are not necessarily justified in drawing an inference of guilt. But you have a right to consider the fact that he does not go upon the stand where a direct accusation is made against him"—to the prejudice of the defendants.

39. That the said court before whom, &c., erred in charging the jury as follows:

"If it be true that either one or two of these men told Vredenburgh on the day in question that there were minutes of this
174 meeting, and that he would find them in such and such a book, telling him where that book was, and Vredenburgh went in and got that paper out of the book without their bringing it out to him, but they telling him where he could find it and seeing him go in and get it, that would be an exhibition. That would be an exhibition of the paper"—to the prejudice of the defendants.

40. That the said court before whom, &c., erred in charging the jury as follows:

"Was this paper exhibited? Now, the State says it was exhibited. Now, I think you can safely take this, and I shall so charge you as an illustration of exhibit. It is not necessary that these defendants should have opened this book of minutes in which this paper is said to have been contained, lay down the book, take out the paper, and read it to Mr. Vredenburgh, and explain it to him; that is not necessary"—to the prejudice of the defendants.

E. W. ARROWSMITH,
*Attorney for A. C. Twining.*
VREDENBURGH, WALL & VAN WINKLE,
*Attorneys for David C. Cornell.*

175 STATE'S EXHIBIT 6.

Question. Did you dictate these minutes?

Answer. Mr. Patterson, Mr. Cornell, Mr. Tusting and myself were here on the 9th of Feb. and went over these matters and as result I dictated these minutes to Miss Rittenhouse. I had authority from Mr. Harvey at any time to use his name as being present at any board meeting.

Question. Who were the 381 shares of stock bought from?

Answer. The stock was purchased from various stockholders whoever they might be and there was so much paid for it, ranging from $70 to $100 per share, and in addition to that there was $50 a share paid to the First National Bank. We borrowed the money to pay for the stock and the assessment of $50 per share that went into the bank. There were five shares paid in separately. We paid $50 assessment on about 600 shares. Money was borrowed at the North American Trust Company, $54,875. We paid the North American Trust Company in round figures $35,000, from the Trust Company and the other $20,000 I borrowed at the Commercial Trust Company temporarily. The loan at the Commercial Trust Company has since been paid. Trust Company provided $10,000 and Col. Harvey provided $10,000. Col. Harvey paid $10,000 and Trust Company $45,000. The shares that are here cost in actual figures about $117 a share and the purchasing pool paid about $127 per share, average. There are in the possession of C. N. M. Harvey 200 shares The remainder of the 754 shares were returned to the owners, having been previously loaned to the pool.

176 STATE'S EXHIBIT 7.

Monmouth Trust & Safe Deposit Company, Asbury Park, N. J.

A special meeting of the Board of Directors of this company was held at the office of the Company on Monday Feb. 9th, 1903.

There were present the following directors:

George F. Krochl, G. B. M. Harvey,
S. A. Patterson, A. C. Twining,
D. C. Cornell.

The minutes of the regular meeting held Jan. 15th, 1903, were read and on motion duly approved.

All loans taken since the last meeting were gone over carefully and upon motion duly seconded, were unanimously approved.

A resolution that this company buy three hundred and eighty-one shares of the stock of the First National Bank at $44,875, was adopted.

On motion the meeting adjourned.

STATE'S EXHIBIT 8.

Monmouth Trust & Safe Deposit Company, Asbury Park, N. J.

A special meeting of the Board of Directors of this company was held at the office of the Company on Monday Feb. 9th, 1903.

There were present the following directors:

R. A. Tusting, G. B. M. Harvey,
S. A. Patterson, A. C. Twining,
D. C. Cornell.

The minutes of the regular meeting held Jan. 15th, 1903, were read and on motion duly approved.

All loans taken since the last meeting were gone over carefully and upon motion duly seconded, were unanimously approved.

A resolution that this company buy three hundred and eighty-one shares of the stock of the First National Bank at $44,875, was adopted.

On motion the meeting adjourned.

177 STATE'S EXHIBIT 9.

STATE OF NEW JERSEY, *County of Monmouth:*

David C. Cornell, of full age, being duly sworn according to law upon his oath says that Samuel A. Patterson neither directly or indirectly at any regular meeting or special meeting, or at any other time, authorized, sanctioned, countenanced or knew of any intention on the part of any of the officers of the Monmouth Trust Company to purchase stock of the First National Bank with moneys of the Trust Company or any other way, and that there was no general or special meeting of the Board of Directors of the Monmouth Trust Company held last week, and that any minutes indicating that there was such a meeting held, are incorrect; and the above statement applies in all respects, to R. A. Tusting, as well as to Mr. Patterson.

DAVID C. CORNELL.

Sworn and subscribed to before me this 18th day of February, 1903.

JOHN F. HAWKINS, *M. C. C. N. J.*

STATE'S EXHIBIT 16.

Monmouth Trust and Safe Deposit Co.

No. 3017.

ASBURY PARK, N. J., *January 19th*, 1903.

North American Trust Company,

New York City.

Pay to the order of Yourselves Thirty-five thousand forty-eight and 77-100 Dollars. ($35,048.77).

(Signed) DAVID C. CORNELL,
*Treasurer.*

It was endorsed, "North American Paid Jan. 19, 1903. Receiving Teller Trust Company." Perforated, "Paid."

178 New Jersey Supreme Court. February Term, 1905.

THE STATE OF NEW JERSEY
*vs.*
ALBERT C. TWINING and DAVID C. CORNELL.

Argued February 21, 1905; Decided November 13, 1905.

*The Opinion of the Supreme Court.*

FORT, *J.:*

The defendants were convicted in the Monmouth Quarter Sessions of exhibiting to an examiner of the State Banking Department a certain false paper, knowing it to be false, with the intent to deceive such examiner as to the condition of the Monmouth Trust and Safe Deposit Company, of which company Twining was the president and Cornell the treasurer. The false paper consisted of a typewritten copy of a minute of an alleged meeting of the Board of Directors of the trust company, which meeting was, in fact, never held.

The minute purports to be an authorization for the purchase of three hundred and eighty-one shares of the capital stock of the First National Bank of Asbury Park, which was found by the examiner among the assets of the trust company.

The jury found that the paper was exhibited, and the proof was conclusive that it was false.

The indictment is founded upon the violation of Section 17 of the Trust Company act of 1899, P. L. 1899, p. 450.

The first contention of the defendant is that the section of the act under which the indictment is found is unconstitutional, in that

it is a subject matter, in the body of the act which is not embraced in its title. State Con., Art. 4, Sect. 7, Subd. 4.

The title of the act is "An Act concerning Trust Com-
179 panies (Revision of 1899), P. L. 1899, p. 450. The section in question reads as follows:

"Every director, officer, agent or clerk of any trust company who wilfully and knowingly subscribes or makes any false statements of facts, or false entries in the books of such trust company, or knowingly subscribes or exhibits any false paper, with intent to deceive any person authorized to examine as to the condition of such trust company, or wilfully or knowingly subscribes to or makes any false report, shall be guilty of a high misdemeanor and punished accordingly."

If we fully comprehend the suggestion of counsel, it is, that a criminal offence cannot be provided for under the title of the act in this case, or, in fact, under the title of any act, which does not specifically relate to the fact that a criminal offence is created by the body of the act.

Does the act in question have more than one object?

An examination of its provisions will show that they all refer to Trust Companies. They do not relate to banks or insurance companies, or other corporations. The penalty imposed by Section Seventeen is limited in its effect to directors, officers, agents or clerks of any Trust Company.

It seems to us that all matters of formation, management, control, regulation, offenses and penalties are germane to a statute which covers, and is intended to cover, an entire subject matter, and that a statute embracing the whole subject matter of Trust Companies, which is entitled "An Act concerning Trust Companies," may constitutionally include a provision making it an offence to do or fail to do certain named things in the operation and management of a Trust Company by its directors, officers, agents or clerks.

By the uniform course of legislation in the State, since the adoption of the Constitution of 1844, it has been the practice by the legislature to embody in acts relating to an entire subject matter, penal provisions for the doing of things not permitted by the statute, or the doing of acts prohibited thereby. Upon almost every subject of general legislation this condition of the statute law of the state will be found to exist. Sections making certain acts misdemeanors are found in the Banking Act, P. L. 1899, p. 431, Sects. 12-14-21;

the Savings Bank Act, G. S., p. 2999, Sections 46-47-83;
180 the Trust Company Act P. L., 1899, p. 450; Sects. 15-17;

the Building and Loan Act P. L., 1903, p. 476, Sects. 52; The Oyster Act, G. S., p. 833, Sects. 140-156-158-172; the Chosen Freeholder Act, G. S., p. 434, Sec. 142; the Bottling Act, P. L., 1891, p. 218; the Acts for Protection of Graveyards and Cemetery Associations, G. S., p. 355, Sect. 34; and p. 361; Sect. 57; the Civil Rights Act, G. S., p. 804, Sect. 2; and the Food and Drug Act, G. S., 1178, Sect. 94; the Dentistry Act, P. L., 1898, p. 119. A conviction under this act was sustained in State vs. Chapman, 40 Vr., 464, affirmed 41 Vr., 339; the Fish and Game Act, G. S., p. 1598, Sects. 177-

182-192; the Health Act, G. S., 1634, Sects. 206-207-208-209-210-216; the Labor Act, G. S., 1904, Sect. 42; the Gunpowder Act, G. S., p. 1634; the Home Industry Act, G. S., 1685, Sect. 3; the Itinerant Vendors' Act, G. S., 1862, Sect. 13; the Justices' Act, G. S., 1862, Sect. 25; and the Intoxicating Liquor Act, G. S., 1786, Sects. 150 and 200. In the act to regulate elections revised 1898, penal sections are found from Sections 188 to 213 inclusive, P. L., 1898, p. 237. The Medicine and Surgery Act, G. S., 2080, Sects. 4-14-25-36-50; The Pharmacy Act, G. S., 2459, Sect. 9; The revision of the Tax Act, P. L., 1903, p. 394, Sects. 61-62; The Warehouseman's Act, G. S., 3746, Sect. 7; in the Oaths and Affidavits Act, G. S., 2329 many penal sections will be found. The Harbor Masters' Act, G. S., 2323, Sect. 64; the Pilots' Act, G. S., 2472, Sect. 65; the Weights and Measures Act, G. S., 3751, Sect. 13. And many others.

We are not prepared to overthrow all the penal clauses in practically all the general acts of the State, after a uniform practice of over half a century of treating such clauses as germane to statutes embodying but a single subject.

We think where a penal clause, in a statute embracing a given subject, simply relates to and provides for the punishment of violations of the provisions of such act, that such a provision is not in conflict with Art. 4, Sect. 7, Par. 4, of the State Constitution, and that it is not essential to valid legislation against offenses created by such acts, that they should be enacted under the title of "An Act for the punishment of Crimes."

The case chiefly relied upon to sustain the contention of
181 the plaintiff in error was Shivers *vs.* Newton, 16 Vr. 469.

An examination of this case will show it to sustain the view we take. The title of the act there was "An Act to Prevent the Adulteration and to Regulate the Sale of Milk." Mr. Justice Read points out that under this title only penalties for adulterating milk could be embodied in the act, while the second section of the act imposed a penalty for the production of unwholesome milk by other methods. He says: "The latter prohibition is, in my judgment, clearly outside the object of the legislation as expressed in the title." The penalty imposed by the Trust Company act under which the defendants were convicted, relates to the duties of the officers of a Trust Company conducting business under the act, and to the punishment for the violation of those duties in any of the respects provided for in the act. This does not seem to us to be within the reasoning of Shivers *vs.* Newton, *supra.*

The next contention is that the defendants were officers of the Monmouth Trust and Safe Deposit Company and were organized under the act of 1885, entitled "An Act for the Incorporation of Safe Deposit and Trust Companies." (P. L., 1885, p. 270) and that section seventeen of the act of 1899 entitled "An Act Concerning Trust Companies," under which this indictment was found, does not apply to "Safe Deposit and Trust Companies," created under the act of 1885.

In 1899 there was a revision of all the acts relative to Trust and Safe Deposit Companies, and separate statutes were passed for the

organization of each, and all trust companies and safe deposit company acts, and acts for the creation of safe deposit and trust companies were repealed. P. L., 1899, p. 450; P. L., 1899, p. 468; P. L., 1899, p. 474.

The act of 1885 is expressly repealed by Sect. 4 of the Statute last cited.

By section eight of the repealing act, all vested rights of the companies organized under the acts repealed, are reserved with the right in the companies to continue to enjoy the rights and advantages which they then enjoyed; P. L., 1899, p. 475; and by section thirty of the Trust Company revision of 1899 it is expressly enacted that

"the provisions of this act shall be applicable to and the words
182 'Trust Companies' when used in this act, shall be construed to include all trust companies, and all safe deposit and trust companies, heretofore organized under the laws of this state, whether by special charter or under general act or otherwise, as well as corporations hereafter organized under this act." This section also reserves to trust and safe deposit companies the rights and privileges they now possess.

It is within the power of the legislature, in passing a general act, to reserve and preserve rights and privileges existing in any class of corporations brought under the provisions of a general law. Such an act is not open to the objection of being special.

Dickinson *vs.* Board of Freeholders, 60 Atl. Rep. 220, Nor., to the contention that such a reservation is not embraced within the title of the act.

Limitations upon a power granted by an act, or the reservation of powers existing in certain corporations brought under the act, in addition to those granted, are proper subject matters to be embodied in a statute, where the powers relate to the class concerning which the legislation is enacted. All such provisions are germane to the subject matter of the legislation embraced within the statute.

It is clearly within the right of the legislature, while reserving powers existing in a corporation, to provide that in the future exercise of such powers, the company or its officers shall be subject to certain restrictions and liable to punishment for their violation. That is all that is done by this statute.

It was further argued that, conceding the statute under which this indictment is found, to be valid, the document exhibited in this case cannot be said to be a false paper within the meaning of the act,—the contention being that "knowingly subscribes or exhibits any false papers" means negotiable paper, or some paper which is a part of the assets of the bank. We are unable to give this narrow construction to these words, in the connection in which they stand in the statute. We think it means what it says, "subscribes or exhibits *any* false paper, with intent to deceive the Examiner." Any other construction destroys all force to the word "subscribes" an*y* any construction which sustains the theory that an offense exists by
183 subscribing a false paper also upholds the construction that to exhibit such false paper to the examiner, with intent to deceive, is within the statute.

But, it is further insisted that "the false paper must be one that can deceive the Examiner as to the financial condition of the corporation." We agree with that view. We think under the proof that in exhibiting this paper it was the purpose of the defendants to deceive the examiner as to the financial condition of the bank. The proof was that the stock the purchase of which the false minute purported to authorize, was in fact the stock of the defendant and other officers and directors of the Trust Company. That at the time they actually entered the transaction upon the books of the Trust Company, the stock was worthless, the First National Bank of Asbury Park having failed. If this action of the board of directors had actually taken place, and the purchase been made in good faith, the Trust Company had not only lost the value of this stock, but was liable to assessment, as the owner of this stock, under the National Banking Act, in case of a deficit in the funds of the Asbury Park National Bank, while the defendants were released, not only to the Trust Company, but as stockholders in the Asbury Park National Bank for any deficiency assessment.

They had shifted their worthless asset, and its contingent liability, upon the Trust Company. Did not that affect its financial condition?

If the transaction did not occur, as the false minutes alleged, then the defendants, and the others interested with them in the stock matter, were liable to the Trust Company, to reimburse it for the stock which they as officers had sold to the Trust Company, and fraudulently taken forty-five thousand dollars of its funds to pay therefor, to themselves. An agent, such as these officers, cannot deal with the company, (his principal) and pass over stock to it and take its funds in payment thereof. Whether the directors had authorized it, therefor-, was of vital importance to the financial condition of the Trust Company, and to the examiner in reporting upon its financial condition. Its acceptance covered the fraud of the defendants and held the Trust Company to a bargain not otherwise legal, and
184 relieved the defendants from liability to the Trust Company, for the fraudulent depletion of the assets of the Trust Company to the extent of their unlawful act in the matter. Without the false minute to exhibit the Trust Company could repudiate the transaction and hold the defendants for the whole amount. Upon the question of what was the true financial condition of the Trust Company the false minute was vital to the examiner.

The evidence, it is claimed, does not prove that the defendant Twining exhibited the false minute to the examiner.

The testimony of the examiner was that he asked for the authority for this purchase. The proof was that Twining had dictated the false minute to his stenographer, and after it was written had placed it in the minute book. That he was present in an adjoining room when the Examiner asked for it, and that the defendant, Cornell, told the Examiner that it was in the minute book, and that either the Examiner himself went and got the minute book or that Cornell handed it to him.

The Examiner says specifically that Cornell was present when he

received the minute book with this false minute in it, and he thinks he handed it to him; that on the fourteenth day of February, the day he first went to the Company, Twining, he thinks, told him it was the minutes of the board, but, if he did not do so that day, he is positive he did on the sixteenth, which was the Monday following, and was while he was still examining the bank. Any statement by Twining before or after the minutes came into the hands of the examiner and while he was examining the bank, that that was the minute of the board authorizing the purchase, was an exhibition of the minute. To state to the examiner that that was the minute, for the purpose of deceiving him as to the truth, was to exhibit the minute within the statute.

In this connection reference should be made to the exception taken to the charge of the trial judge, that:

"If you are satisfied that one produced the false minutes, and that "with the consent of the other, he being present and by his silence "acquiescing in it, with full knowledge that it was being produced "and exhibited for the purpose of deceiving the examiner, Twining "is just as guilty as Cornell."

There was no error in this. In misdemeanors all are
185 principals. Standing by while a co-misdemeanor does the act of exhibiting, makes you guilty. Both will be deemed to exhibit under such circumstances.

We see no error in including in the indictment the prefatory matter which is objected to. It is at most mere surplussage. The charge upon which the defendants were tried and the evidence introduced, was the exhibition of the false paper only. The indictment was not offered in evidence and did not go to the jury. It could not have prejudiced in any way the trial of the defendants.

We find no error in the suggestion that the witness Vredenburgh, who was the Examiner, was permitted to testify to the fact that he was an Examiner, and that the Court did not require him to show written authority that he was authorized to examine the bank. The statute does not require the Banking Commissioner to appoint his examiners in writing. That he was examining for and by the direction of the Banking De-artment, was proved. About the fact there was no question. An official may testify that he is such official, without producing his certificate of appointment.

Den V. Pond Coxe, 379.
Potter *v.* Lather, 3 John 426, 431.
Berryman *v.* Wise 4 Term Rep., 366.
Brewster *v.* Vail Spencer 56.
Reeves *v.* Ferguson, 2 Vr. 107 (119).
1 Greenleaf on Evidence, Sets. 83, 92.

The Cornell confession was properly admitted as against Cornell, and the Court expressly limited its evidential force to Cornell, in admitting the evidence, and again on the request of counsel at the end of its charge. In the charge to the jury the Court referred to the fact that the defendants did not see fit to go upon the stand in their own behalf, and said, "because a man does not go upon the

stand you are not necessarily justified in drawing an inference of guilt. But you have a right to consider the fact that he does not go upon the stand where a direct accusation is made against him." This was not objectionable.

State *vs.* Parker, 32 Vr. 338.
State *vs.* Wines, 36 Vr. 31.

The entire record is returned in this case, and it not ap-
186 pearing that the defendants suffered manifest wrong or injury in the admission or rejection of evidence or the charge of the Court, the judgment of the Monmouth Quarter Sessions is affirmed.

187 New Jersey Supreme Court, November Term, 1905.

STATE OF NEW JERSEY, Defendant in Error,
*vs.*
ALBERT C. TWINING and DAVID C. CORNELL, Plaintiffs in Error.

In Error.

*Affirmance.*

The Court having heard the argument of counsel, and inspected the judgment removed by the writ of error in this cause, and duly considered the causes assigned for error, it is ordered that said judgment be and the same hereby is affirmed; and that the record be remitted to the Court of Quarter Sessions of the County of Monmouth to be proceeded in according to law.

Entered November 20, 1905, on motion of
H. M. NEVIUS, *Pros., etc.*

188 New Jersey Court of Errors and Appeals.

THE STATE OF NEW JERSEY, Defendant in Error,
*vs.*
ALBERT C. TWINING and DAVID C. CORNELL, Plaintiffs in Error.

In Error to the Supreme Court.

*Assignment of Errors and Specification of Causes Relied Upon for Reversal.*

Afterwards, that is to say, on the sixteenth day of January, in the year nineteen hundred and six, in the Court of Errors and Appeals of Last Resort, come the said Albert C. Twining, by Edward M. Colie, his attorney, and David C. Cornell, by Vredenburgh, Wall & Van Winkle, his attorneys, and say that in the record and proceedings aforesaid, and also in the matters recited and contained in the

said bill of exceptions, and in the record, and also in the giving of the verdict, conviction and judgment aforesaid, there is manifest error, and further that on the trial below, and by the judgment of the Supreme Court, they suffered manifest error, wrong and injury. And they humbly assign error and also specify the causes in the record of the proceedings had upon said trial returned with the writ of error upon which they rely for reversal according to the statute in such case made and provided.

(1.) That said indictment and the matters therein are not sufficient in law to convict the said Albert C. Twining and David C. Cornell, or either of them of the offence declared in said indictment, or of any other offence in law.

(2.) That the Monmouth Quarter Sessions refused to quash said indictment when thereunto moved by counsel for the said Albert C. Twining and David C. Cornell, whereas, for the reasons assigned to the said Court, by counsel appearing on the record of the said trial or some one of them said court should have quashed said indictment.

(3.) That upon the trial illegal evidence offered by the State was admitted against objection and exception on the part of the
189 said Albert C. Twining and David C. Cornell and each of them as more particularly appears in the several bills of exceptions sealed upon the admission of evidence.

(4.) Upon said trial legal evidence offered on the part of the said Albert C. Twining and David C. Cornell and each of them was excluded as more particularly appears in the several bills of exception sealed upon the exclusion of evidence.

(5.) Illegal evidence admitted on said trial was allowed to stand against motion on behalf of the said Albert C. Twining and David C. Cornell and each of them to strike out the same as more particularly appears in the several bills of exceptions sealed upon refusal to strike out evidence.

(6.) Said Court of Quarter Sessions refused at the close of the testimony on the part of the State and also at the close of the whole case to direct the jury to acquit the said Albert C. Twining, under said indictment, although moved to do so in his behalf, and although for the reasons assigned for such motion appearing in said record of the proceedings had upon said trial or some one of said reasons a verdict of acquittal should have been directed as to said Albert C. Twining.

(7.) Said Court of Quarter Sessions refused at the close of the testimony on the part of the State and also at the close of the whole case, to direct the jury to acquit the said David C. Cornell under said indictment although moved to do so in his behalf, and although for the reasons assigned for such motion appearing in such record of the proceedings had upon said trial or some or one of said reasons a verdict of acquittal should have been directed as to the said David C. Cornell.

(8.) That the said Court of Quarter Sessions refused to quash the indictment against the said defendants or either of them, although thereunto moved so to do by the said defendants and by each of

them, the grounds urged for the quashing of the indictment on behalf of the defendants being:

(*a.*) That the indictment charged a violation of the 17th section of the act entitled "An act concerning trust companies," (Revision of 1899); that this section was in contravention of Article IV, Section 7, Paragraph 4 of the constitution of New Jersey;

190 (*b.*) That the indictment was bad for duplicity; (*bb.*) That the indictment was uncertain so that no crime was charged thereby and so that the defendants were not notified of the crime they were charged with;

(*c.*) That the indictment did not show that the person to whom the paper mentioned in the indictment was exhibited was authorized to examine as to the condition of the bank;

(*d.*) That the defendants could not be indicted for violation of the said 17th section of the act aforesaid, under the allegations of the indictment;

(*e.*) That the things alleged in the indictment in reference to the false minutes did not amount to a crime under the law relating to the Monmouth Trust and Safe Deposit Company.

(*f.*) That the indictment did not allege that the company therein named was a trust company created under the act of 1899.

(9.) That the court before whom the said indictment was tried held that the first portion of the indictment was a mere recital of a part of the facts which the defendants brought about to misrepresent to the person authorized to examine the bank by presenting the paper which, in the indictment, is alleged to have been a false minute; that it was competent to show, if the state could, the misapplication of funds as specified in the indictment, simply for the purpose of following it up then with proof showing that they tried to deceive the banking department or the person appointed to examine the company, by the use of an alleged false minute; that that was not a separate and distinct crime, against the objection of the defendants and to their prejudice, and allowed the indictment to go before the jury.

(10.) That the said Court of Quarter Sessions allowed a material witness on the part of the state, Larue R. Vredenburgh, to testify as to his appointment as an officer of the Department of Banking and Insurance without presenting any certificate of his appointment or other proof except his own statement that he was an examiner of the Department of Banking and Insurance, against the objection of the defendants and to their prejudice.

191 (11.) That the said court before whom the said indictment was tried, allowed the witness, Larue R. Vredenburgh, a material witness on the part of the State, to prove by his own statement, without any written or adequate proof in corroboration or support thereof, that he was an authorized examiner of the Department of Banking and Insurance of the State of New Jersey, against the objection of the defendants and to their prejudice.

(12.) That the said court before whom said indictment was tried, allowed the said witness, Larue R. Vredenburgh, to prove by his

own statement, without any adequate or other proof in support thereof, that at the time mentioned in the indictment he was exercising authority as an Examiner of the Department of Banking and Insurance of the State of New Jersey, against the objection of the defendants and to their prejudice.

(13.) That the said court before whom, &c., allowed the witness, Larue R. Vredenburgh, to state that his attention was directed to the entries on pages 110 and 111 of the State's Exhibit No. 3, without stating by whom his attention was thereto directed, against the objection of the defendants and to their prejudice.

(14.) That the said court before whom, &c., admitted a conversation had in February, 1903, between the witness, Larue R. Vredenburgh, and the defendant, David C. Cornell, in relation to the items of debit and credit appearing on pages 110 and 111 of State's Exhibit No. 3, against the objection of the defendants and to their prejudice.

(15.) That the said court before whom, &c., admitted a conversation between the witness, Larue R. Vredenburgh, and the defendant, Albert C. Twining, on February 14th, 1903, in regard to the case of the State against these defendants, against the objection of the defendants and to their prejudice.

(16.) That the said court before whom, &c., admitted a conversation between the witness, Larue R. Vredenburgh, and the defendant, Albert C. Twining, on the 16th day of February, 1903, in regard to the case of the State against said defendants, against the objection of the defendants and to their prejudice.

(17.) That the said court before whom, &c., admitted a
192 conversation in February, 1903, between the witness, Larue R. Vredenburgh, and the defendant, David C. Cornell, in connection with Exhibit 7, and in connection with the transaction on pages 110 and 111 and the minutes of meeting subsequent, to the delivery of the statement to the said witness, Larue R. Vredenburgh, and the conversation above referred to, against the objection of the defendants and to their prejudice.

(18.) That the said court before whom, &c., admitted to be marked for identification and evidence State's Exhibit No. 8, although the said exhibit was not mentioned in or connected with the charge laid in the indictment, against the objection of the defendants and to their prejudice.

(19.) That the said court before whom, &c., admited a conversation between the witness, Larue R. Vredenburgh, and the defendant, Albert C. Twining, on February 14th, 1903, relative to the entry on page 110 in State's Exhibit No. 2, concerning a credit of the North American Trust Company of $35,048.77, against the objection of the defendant- and to their prejudice.

(20.) That the said court before whom, &c., admitted a conversation between the witness, Larue R. Vredenburgh, and the defendant, David C. Cornell, on the 17th and 18th of February, 1903, and a conversation with Mr. Patterson by the said David C. Cornell in the presence of the said Larue R. Vredenburgh concerning whether the said Patterson was present at a meeting referred to in certain min-

utes, a meeting at which a resolution of authority had been passed to purchase stock of the First National Bank, against the objection of the defendants and to their prejudice.

(21.) That the said court before whom, &c., allowed the witness, Larue R. Vredenburgh, to testify as to the capacity in which he was acting and that he disclosed the same to the defendants, and that he had been at the Trust Company before in the capacity of bank examiner while the defendants had been acting as officers of the institution, against the objection of the defendants and to their prejudice.

(22.) That the said court before whom, &c., permitted the witness, Larue R. Vredenburgh, to testify that he knew that $44,875
193 of the Trust Company's money had been used to pay for some of the First National Bank stock, against the objection of the defendants and to their prejudice.

(23.) That the said court before whom, &c., permitted the witness, Larue R. Vredenburgh, to testify how $10,000 was paid on the 14th of February, 1903, without producing the cheques of payment, against the objection of the defendants and to their prejudice.

(24.) That the said court before whom, &c., permitted the witness, R. A. Tusting, to state that the statements contained in the paper marked Exhibit No. 8, were not true, the same not relating to the charge laid in the indictment, against the objection of the defendants and to their prejudice.

(25.) That the said court before whom, &c., admitted in evidence the book of minutes in which Exhibit No. 7 was contained, against the objection of the defendants and to their prejudice.

(26.) That the said court before whom, &c., admitted in evidence Exhibit, No. 8, being corrected copy of the minutes, the same not being the minutes mentioned in the indictment, against the objection of the defendants and to their prejudice.

(27.) That the said court before whom, &c., admitted in evidence Exhibit No. 9, an affidavit made by David C. Cornell before John F. Hawkins, against the objection of the defendants and to their prejudice.

(28.) That the said court before whom, &c., admitted in evidence a draft (Exhibit No. 16) for $35,048.77, against the objection of the defendants and to their prejudice.

(29.) That the said court before whom, &c., permitted Annie E. Rittenhouse, a witness, to testify as to the handwriting of the items on page 110 of book marked No. 3 for identification, against the objection of the defendants and to their prejudice.

(30.) That the said court before whom, &c., admitted in evidence the two items on Exhibit No. 3, the same being prejudicial to the defendant, David C. Cornell, against the objection of the defendants and to their prejudice.

(31.) That the said court before whom, &c., permitted the witness, Samuel A. Patterson, to testify that on or about the 14th
194 day of February, 1903, he had a conversation with the defendant, David C. Cornell, concerning Exhibit No. 7, and

permitted the said witness to testify to the said conversation, against the objection of the defendants and to their prejudice.

(32.) That the said court before whom, &c., stated that the defendant, David C. Cornell, exhibited the minutes mentioned in the indictment and adjudicated the charge in the indictment and prejudiced the defendants before the jury by stating that the said defendant, David C. Cornell, had exhibited said minutes, against the objection of the defendants and to their prejudice.

(33.) That the said court before whom, &c., allowed the witness, Larue R. Vredenburgh, to be recalled as a witness after the State had closed and made its case against the said defendants, against the objection of the defendants and to their prejudice.

(34.) That the said court before whom, &c., refused to instruct the jury to acquit the defendants or either of them, although regularly moved thereunto, and although the evidence did not show that the said Albert C. Twining had ever exhibited the paper or minutes in question to the said witness, Larue R. Vredenburgh, and although the evidence did not prove the defendants or either of them to have been guilty of any crime, against the objection of the defendants and to their prejudice.

(35.) That the said court before whom, &c., refused to instruct the jury to acquit the defendants or either of them although regularly moved thereunto, and although the evidence did not show that the said David C. Cornell had ever exhibited the paper or minutes in question to the said witness, Larue R. Vredenburgh, and although the evidence did not prove the defendants or either of them to have been guilty of any crime, against the objection of the defendants and to their prejudice.

(36.) That the said court before whom, &c., erred in its charge to the jury in instructing the jury as follows:

"Now, Twining and Cornell, this paper says, were present. They are here in court and have seen this paper offered in evidence, and they know that this paper says that they were the two men
195 or two of the men who were present. Neither of them has gone upon the stand to deny that they were present, or to show that the meeting was held. Now, it is not necessary for these two men to prove their innocence. It is not necessary for them to prove that this meeting was held. But the fact that they stayed off the stand, having heard testimony which might be prejudicial to them, without availing themselves of the right to go upon the stand and contradict it, is sometimes a matter of significance," to the prejudice of the defendants.

(37.) That the said court before whom, &c., erred in its charge to the jury as follows:

"They (the defendants) simply have the right to go upon the stand, and they have not availed themselves of it, and it may be that there is no necessity for them to go there. I leave that entirely to you"—to the prejudice of the defendants.

(37*a*.) That the court before whom said cause was tried erred in allowing the jury to have the said indictment before them and direct-

ing them to consider or read it in order to ascertain the crime charged against the defendants.

(38.) That the said court before whom, &c., erred in its charge to the jury as follows:

Now, gentlemen, if you believe that that is so; if you believe this testimony that Cornell did direct this man's attention to it—Cornell has sat here and heard that testimony and not denied it—nobody could misunderstand the import of that testimony, it was a direct accusation made against him of his guilt—if you believe that testimoney beyond a reasonable doubt, Cornell is guilty. And yet he has sat here and not gone upon the stand to deny it. He was not called upon to go upon the stand and deny it, but he did not go upon the stand and deny it, and it is for you to take that into consideration.

Now, Twining has also sat here and heard this testimony but you will observe there is this distinction as to the conduct of these two men in this respect: the accusation against Cornell was specific by Vredenburgh. It is rather inferential if at all, against Twining, and he might say, it is for you to say whether he might say, "Well, I don't think the accusation against me is made with such a
196 degree of certainty as to require me to deny it, and I shall not; nobody will think it strange if I do not go upon the stand to deny it, because Vredenburgh is uncertain as to whether I was there; he won't swear that I was there." So consequently the fact that Twining did not go upon the stand can have no significance at all.

You must say that the fact that Cornell did not go upon the stand has significance. You may say so, because the circumstances may be such that there should be no inference drawn of guilt or anything of that kind from the fact that he did not go upon the stand. Because a man does not go upon the stand you are not necessarily justified in drawing an inference of guilt. But you have a right to consider the fact that he does not go upon the stand where a direct accusation is made against him"—to the prejudice of the defendants.

(39.) That the said court before whom, &c., erred in charging the jury as follows:

"If it be true that either one or two of these men told Vredenburgh on the day in question that there were minutes of this meeting, and that he would find them in such and such a book, telling him where that book was, and Vredenburgh went in and got that paper out of the book without their bringing it out to him, but they telling him where he could find it, and seeing him go in and get it, that would be exhibition. That would be an exhibition of the paper"—to the prejudice of the defendants.

(40.) That the said court before whom, &c., erred in charging the jury as follows:

"Was this paper exhibited? Now, the State says it was exhibited. Now, I think you can safely take this, and I shall so charge you as an illustration of exhibit. It is not necessary that these defendants should have opened this book of minutes in which this paper is said to have been contained, lay down the book, take out the paper, and

read it to Mr. Vredenburgh, and explain it to him; that is not necessary"—to the prejudice of the defendants.

(41.) That the Supreme Court erred in holding that there was no error in the refusal of the Monmouth Quarter Sessions to quash said indictment as against the defendants or either of them for the reasons presented to said Court, or any of them.

197 (42.) That the Supreme Court erred in holding that there was no error in the refusal of the Monmouth Quarter Sessions to direct the jury to acquit the defendants or either of them at the close of the State's case for the reasons presented to said Court or any of them.

(43.) That the Supreme Court erred in holding that there was no error in the refusal of the Monmouth Quarter Sessions to direct the jury to acquit the defendants or either of them at the close of the whole case for the reasons presented to said Court or any of them.

(44.) That the Supreme Court erred in holding that there was no error committed by the Monmouth Quarter Sessions on the trial of said indictment in the admission of evidence against the defendants or either of them, in the particulars hereinbefore set forth.

(45.) That the Supreme Court erred in holding that there was no error committed by the Monmouth Quarter Sessions in the instructions to the jury as to the defendants or either of them in the particulars hereinbefore set forth.

(46.) That the Supreme Court erred in holding that the matters set out in the indictment constituted a crime as to the defendants or either of them, under the law of the land.

(47.) That the Supreme Court erred in holding that the evidence in the case proved or constituted a crime as to the defendants or either of them, under the law of the land.

(48.) That the Supreme Court erred in holding that the provisions of Sec. 17, P. L. 1899, p. 461 applied to the Monmouth Trust and Safe Deposit Company.

(49.) That the Supreme Court erred in holding that the act P. L. 1899, p. 450 was constitutional so far as it purported to apply to Safe Deposit and Trust Companies.

(50.) That the Supreme Court erred in holding that Sec. 30 of the aforesaid act was constitutional as far as it provided as follows:

"The provisions of this act shall be applicable to, and the words "trust company," when used in this act, shall be construed to include all trust companies and all safe deposit and trust companies heretofore organized under the laws of this state, whether by special charter or under general act or otherwise."

198 (51.) That the Supreme Court erred in holding that section 17 of the aforesaid act was constitutional.

(52.) That the Supreme Court erred in holding that there was no error prejudicial to the defendants or either of them committed by the Monmouth Quarter Sessions in the trial of said indictment.

(53.) That the Supreme Court erred in sustaining the judgment of the Monmouth Quarter Sessions instead of reversing it for the reasons hereinbefore given.

(54.) That the Supreme Court erred in not reversing the judgment of the Monmouth Quarter Sessions for the reasons hereinbefore given.

(55.) That the Monmouth Quarter Sessions, in charging the jury in the trial of this cause as follows:

"But the fact that they (referring to the defendants) stayed off the stand, having heard testimony which might be prejudicial to them, without availing themselves of the right to go upon the stand and contradict it, is sometimes a matter of significance."

And further:

"They simply had the right to go upon the stand, and they have not availed themselves of it, and it may be that there is no necessity for them to go there. I leave that question to you."

And further:

"And yet he (meaning David C. Cornell, one of the defendants) has sat here and not gone upon the stand to deny it; he was not called upon to go upon the stand and deny it, but he did not go upon the stand and deny it; and it is for you to take that into consideration."

And further:

"You must say that the fact that Cornell did not go upon the stand has no significance; you may say so because their circumstances may be such that there should be no inference drawn of guilt, or anything of that kind, from the fact that he did not go upon the stand; because a man does not go upon the stand you are not necessarily justified in drawing an inference of guilt, but you have a right to consider the fact that he does not go upon the stand where a direct accusation is made against him"—violated Article 14th of
199 the Constitution of the United States; and the Supreme Court violated said Article 14th in holding that there was no error committed by the Monmouth Quarter Sessions on the trial of the said indictment, in so charging the jury. And these defendants insist that thereby they have been deprived of their liberty without due process of the law, that thereby they have been denied equal protection of the laws in violation of said Article fourteenth of the Constitution of the United States.

EDWARD M. COLIE,
*Attorney for Albert C. Twining, a Plaintiff in Error.*

VREDENBURGH, WALL & VAN WINKLE,
*Attorney- for David C. Cornell, a Plaintiff in Error.*

200 New Jersey Court of Errors and Appeals.

THE STATE OF NEW JERSEY, Defendant in Error,
*v.*
ALBERT C. TWINING and DAVID C. CORNELL, Plaintiffs in Error.

In determining whether the title of an act expresses its object within the meaning of the cause of the Constitution on that subject, there should be attributed to the words used as indicating that object,

such meaning as they had then acquired in common and legislative usage.

The title of the act entitled "An act concerning trust companies, Revision of 1899" expresses its objects to be legislation regulating not only trust companies incorporated under that designation, but also companies organized under the "Act for the incorporation of safe deposit and trust companies" upon which had been conferred broad trust powers and which had been designated in supplements to the last mentioned act as "trust companies."

Such a title includes in its expressed object not only regulation, but also such provision as might be deemed proper to enforce such regulation by penalties or prosecution.

A paper exhibited to a person, authorized to examine the condition of a trust company, as the unrecorded minutes of a meeting of directors and containing a resolution for the purchase of shares of stock which the examiner had discovered among the assets of the company and inquired about, is a "paper" within the meaning of Section 17 of the Trust Companies Act of 1899 and if false and exhibited to the examiner with intent to deceive him, the officer or officers exhibiting it were guilty of a crime under that section.

The facts presented in the bills of exception justified the trial judge in bringing to the attention of the jury the failure of
201 the defendants to avail themselves of the privilege of testifying in their own behalf. State *v.* Parker, 32 Vroom (62 N. J. L.) 308. S. C. 33 Vroom, (63 N. J. L.) 801.

On Error to the Supreme Court.

Mr. Edward N. Colie and Mr. Gilbert Collins, (with whom was Mr. John G. Johnson of the Pennsylvania Bar) for Albert C. Twining.

Mr. James B. Vredenburgh and Mr. Marshall Van Winkle for David C. Cornell.

The opinion of the court was delivered by MAGIE, *Chancellor:*

The judgment brought before us by this writ of error was rendered in the Supreme Court, and affirmed the conviction of the plaintiffs in error in the Monmouth County Quarter Sessions upon an indictment which charged them with a violation of one of the provisions of the 17th section of the act entitled "An act concerning trust companies, Revision of 1899," approved March 24, 1899, (Laws, 1899 page 450). So far as those provisions affect the present case, they make every director or officer of any trust company, who wilfully or knowingly subscribes or exhibits any false paper, with intent to deceive any person authorized to examine as to the condition of such trust company, guilty of a high misdemeanor.

The indictment charged that plaintiffs in error, as directors and officers of the Monmouth Trust and Safe Deposit Company, a corporation organized and existing under the laws of this state, intending to deceive a person authorized to examine as to the condition of said company, did exhibit and show to him a certain false paper,

of a tenor and effect expressly stated. The falsity of the paper exhibited was expressly charged.

It is first contended on behalf of the plaintiffs in error, that the provisions contained in the 17th section of the Trust Companies Act of 1899 did not operate upon the officers or directors of the
202 Monmouth Trust and Safe Deposit Company. This is urged upon the ground that the said company did not fall within the object expressed in the title of that act.

It is argued that the title "An act concerning trust Companies" neither includes nor expresses any object of Legislation respecting safe deposit and trust companies, and is therefore open to the objection that any provision therein respecting such companies is not within the object disclosed by the title. The inclusion of any legislation in this act respecting safe deposit and trust companies is claimed to be obnoxious to the constitutional provision contained in Placitum 4, Section VII, Article IV of the Constitution, which reads as follows:

"To avoid improper influences which may result from intermixing in one and the same act such things as have no proper relation to each other, every law shall embrace but one object, and that shall be expressed in the title."

The meaning of this constitutional provision does not admit of the least doubt. It has been thoroughly settled by repeated decisions of our courts, including the Court of Last Resort, that, to accord with this constitutional provisions, the title of every act must not only include, but must also express, its object. While the title need not include nor express the means by which the legislation proposed is to effect that object, it must plainly express that object. Rader *v.* Township of Union 10 Vroom. (39 N. J. L.) 509. Stockton *v.* C. R. Co. 5 Dick. (50 N. J. Eq.) 70. Newark *v.* Mt. Pleasant Cemetery Co. 29 Vr. (58 N. J. L.) 172. Payne *v.* Mahom, 15 Vr. (44 N. J. L.) 213. Mortland *v.* Christian, 23 Vro. (52 N. J. L.) 537. Johnson *v.* Asbury Park, 31 Vr. (60 N. J. L.) 427. Amer. Surety Co. *v.* Great White Co. 13 Dick (58 N. J. Eq.) 526.

It seems to have been proved on the trial of the indictment, and it is conceded in this argument, that the Monmouth Trust and Safe Deposit Company was organized under the act entitled "An act for the incorporation of safe deposit and trust companies," approved April 20, 1885. (Laws, 1885, page 270). That act conferred upon corporations organized thereunder, power to receive for de-
203 posit property of every kind, and to collect coupons for interest upon bonds and securities thus deposited. The meager powers that were thus conferred were, from time to time, greatly extended. By a supplement to the last mentioned act, passed April 6, 1886, (Laws, 1886, page 207), corporatio-s organized under that act, which had a certain capital, were authorized to act as agents to transfer and register and countersign, and to buy and sell stocks and bonds or other obligations of any other corporation or public authority, and to receive and manage any sinking fund therefor, and to act as assignees, receivers, agents, executors, administrators or guardians, and to execute trusts of every description. It is obvious that the dual

functions which these corporations were permitted to exercise by the original act, viz: the accepting of deposits of property and the execution of trusts, were largely extended by the provisions of the last mentioned supplement, in respect to the functions last named.

By an amending act, purporting to amend the supplement to the original act (which must be the supplement above mentioned) approved May 6, 1887, (Laws, 1887, page 262), the provisions of that supplement were again enacted, probably because the supplement had not been approved, but had become a law without approval.

By a further supplement to the original act, approved Feb. 6, 1888 (Laws, 1888, page 19), any corporation organized thereunder in any city in which there is no national bank of deposit or discount, was authorized to discount notes, bills and evidences of debt, and to buy and sell bullion and to buy and sell commercial paper, provided that, by the vote of two-thirds of the stockholders and the unanimous vote of the board of directors, it accepted the privileges thus conferred.

By a further supplement, to the original act, approved March 13, 1888, (Laws, 1888, page 164), corporations organized under the original act were permitted to be appointed to any and all trusts by any officer or court of this state, without being required to give security for the discharge of the duties of such trust or ap-
204 pointment to office.

By "An act relative to safe deposit and trust companies" approved June 10, 1890, (Laws, 1890, page 431), any safe deposit and trust company organized under any law of this state was authorized to receive money on deposit and to pay out the same on demand or otherwise, as agreed.

By a further supplement to the original act, approved March 14, 1893, (Laws, 1893, page 288), further powers were conferred on any "trust company" incorporated or organized under that act and doing business in any city or village where there is no national or state bank of discount and deposit, to discount bills and perform other functions in buying of bullion and bills of exchange and commercial paper, provided the company obtained the consent of two-thirds of the stockholders and a unanimous vote of its board of directors.

By a further supplement to the original act, approved April 26, 1894 (Laws, 1894, page 150), companies organized thereunder were authorized to become surety for receivers, executors, administrators, guardians, trustees or assignees.

By an amending act, approved April 22, 1894, (Laws, 1894, page 152), further power was conferred upon corporations organized under the act, respecting discounting of commercial paper and the purchasing of bullion and bills of exchange. A further supplement to the original act, approved May 1, 1894, (Laws, 1894, page 193), seems to permit parties for whom corporations organized under the original act had become surety, to agree respecting the deposit of the moneys and the safe keeping of the assets for which they were to be held responsible.

By a further supplement, approved March 25, 1895, (Laws, 1895, page 445), additional powers were conferred upon corporations organized under the original act, respecting the appointment of such

corporations to an office of trust without being required to give security, when the capital stock and accumulated surplus reached a certain point.

By a further supplement, approved May 12, 1896, (Laws,
205 1896, page 348), additional powers were conferred on "any trust company organized under said act."

By an amendment to the supplement of 1894, approved March 30, 1897, (Laws, 1897, page 136), any party from whom a bond was required might agree with his surety or sureties for the deposit or safe keeping of money or property for which he might be responsible, in any "safe deposit or trust company authorized to do business as such in this state" in such manner as to prevent the withdrawal of such property without the written consent of such surety or an order of the court on notice to such surety.

The examination of these legislative acts clearly indicates that while the safe deposit feature of these corporations may, perhaps, have originally been the predominant one, by gradual additions to the powers conferred by the original act, the trust feature of the corporations had enormously increased. It is not too much to say that it became the predominant feature of these corporations, and the legislature seems to have recognized it by calling the companies, in several of the supplements above referred to, "trust companies."

Prior to 1885, several trust companies had been incorporated by special laws. The question is whether the title of the act under which plaintiffs in error were indicted expresses its object to be to legislate only respecting trust companies thus created. I am unable to discover that its title thus limited its object to those companies which, under special charters had acquired a special name as to trust companies. On the contrary, I think that the expressed object extended to all companies having the features, characteristics and powers usually acquired by trust companies, although they also had the additional powers of safe deposit companies. The object expressed by the title "trust companies" applied to all those companies which had acquired the capacity of trust companies, and had been known in legislative usage as trust companies. It is matter of common
206 knowledge that, after these companies had been clothed with extensive trust powers by the legislation above shown, they were commonly known and designated as trust companies, and the legislature, in applying to them the name "trust companies," adopted the popular designation. That such was the understanding of the legislature seems apparent from Section 30 of the act in question, which expressly declares that its provisions shall be applicable to, and the word "trust company" used in the act shall be considered to, include all trust companies and all safe deposit and trust companies heretofore organized under the laws of this state. It is true that this provision will not cure a defect in the title of this act, if any defect there exists, and it is only alluded to for the purpose of indicating that the legislative usage was retained, which recognized these companies as "trust companies."

It results, in my judgment, that the title of the act of 1899 expressed the object of the act to be legislation concerning trust com-

panies, including not only such corporations as were trust companies *eo nomine*, but all corporations which had the functions of trust companies and were recognized in legislation as such.

It is further insisted that the provisions of Section 17 of the act of 1899, in so far as they make the acts of officers &c. criminal, are not within the object expressed in the title.

The title indicates the legislative purpose to be directed to such trust companies. Such legislative purpose necessarily includes regulation of such companies, including the regulation of those who direct or act for them, and the enforcement of such regulations. That enforcement is usually provided by enactments for penalties for the breach of the regulations, and this, which Blackstone calls the sanction of the law, seems necessarily included in the title which expressed the object to be to regulate certain corporations. The
Supreme Court in its opinion, has pointed out many in-
207 stances in which this mode of legislation has been resorted to
in this state, and this objection was properly treated and disposed of in the opinion below. It may be added that such an objection was pronounced invalid by the Supreme Court in Hickman *v.* State 33 Vr. (62 N. J. L.) 499 and the judgment in that cause was affirmed in this court, 34 Vr., (63 N. J. L.) 65 on the opinion of the Supreme Court. The doctrine was again stated in the Supreme Court in State *v.* Corson 37 Vr. (66 J. L.) 187, and in State *v.* Lee, 41 Vr. (70 N. J. L.) 368.

It is further contended that the indictment fails to charge against the plaintiffs in error any crime within the meaning of the 17th section. If it does show a crime, it is because it charges the exhibition, to a person authorized to examine into the condition of the Monmouth Trust and Safe Deposit Company, of a false paper, with intent to deceive him as to the condition of such company. It is strenuously urged that the word "paper" must have been used in a limited sense and to include only commercial paper.

I agree with the Supreme Court in the view that the construction thus given is too narrow. These trust companies, while permitted, under certain circumstances, to discount or buy commercial paper, were also permitted to invest their assets in many other modes, and thus received securities other than those comprehended under the term commercial paper. It does not admit of a doubt, in my judgment, that the word paper, in connection with the prohibition against subscribing or exhibiting a false paper with intent to deceive an examiner as to the condition of the trust company, must be extended, at least to all the assets of the company, and all incidents respecting such assets which were committed to paper are included in this word. A false bond and mortgage would be included. A fabrication of an acknowledgment to a genuine mortgage would be included. In short, anything committed to paper that was capable of throwing light upon the condition of the company and used to deceive the examiner, is included in this language.

208 In this case, there was evidence that the trust company had, some time previously made a large payment upon certain shares of stock of a national bank. The payment was not in full

and the stock appears not to have been then delivered or transferred. Just prior to the time the Monmouth Trust and Safe Deposit Company closed its doors, an additional payment was made upon the bank stock and the same was received by the Trust Company and found among its assets. The indictment charged that the defendants exhibited a paper purporting to be the unrecorded minutes of a meeting of the directors of the Trust Company, and a resolution to purchase this stock. It was important in its effect upon the condition of the Trust Company, and the duty of the examiner in respect to this claimed asset, was to ascertain whether the stock had been, in fact, purchased by the Trust Company through a corporate act competent to bind it. The paper was charged to be false, and this fact seems to have been amply proved and is not contested. In my judgment, it was a paper within the meaning of Section 17, and if exhibited to the examiner with intent to deceive him as to the condition of the Trust Company, the defendants were properly found guilty. These were questions for the jury and were properly submitted, to them.

It is further suggested that the crime of exhibiting such a paper cannot be committed by two persons. I am unable to find any substance in this contention. Physically, a paper may be exhibited by two persons; constructively, such an exhibition may be made, and I am unable to perceive any reason why the indictment, in charging them jointly, was an improper charge.

Lastly, it is contended that the trial judge erred in bringing to the attention of the jury the fact that the defendants, though present in court, had not offered themselves as witnesses in their own behalf.

The legislation in this state, permitting persons accused and indicted for crime, to become witnesses in their own behalf, contains no enactment restricting observation by the court or
209 prosecutor, upon the failure of a defendant to avail himself of the privilege thus accorded him. In the case of State *v.* Parker, 32 Vr. (62 N. J. L.) 308, it was pointed out that legislation of similar character, exacted by the Congress of the United States, and by legislatures of many states in the Union, contained such restrictions. In the absence of such restrictions in our legislation, it was there held that when the evidence given on the part of the State, in the presence of the defendant, directly showed acts of his, in respect to which he had been given the privilege of testifying, it was not error to direct the attention of the jury to his failure to avail himself of the opportunity of contradicting such direct evidence. The decision of the Supreme Court in this case was affirmed by this court upon the opinion in the Supreme Court. Parker *v.* State, 33 Vr. (62 N. J. L.) 801. We think the doctrine there declared was correct, and are satisfied that its essential features were in no respect diminished or altered by the opinion in the case of State *v.* Wines, 36 Vr., (65 N. J. L.) 31. On the contrary, C. J. Depue, in the opinion in that case, points out the distinction, which had been intimated in State *v.* Parker, between the situation of a defendant against whom there was direct evidence of guilty acts,

which he failed to deny by his own evidence though privileged to do so, and his situation when the evidence against him was only circumstantial, and therefore only raised inferences as to his acts.

Other objections presented in the argument are deemed to have been rightly treated in the decision of the Supreme Court.

The judgment brought up by this writ of error must, therefore, be affirmed.

Endorsed: "Filed Nov. 19, 1906, S. D. Dickinson, Secretary of State."

[Endorsed:] State of New Jersey Department of State Comparing and Certifying Division Copy Correct Compared by J. L. Hendricks Original Read by Fisher. J. L. Hendricks in charge of Division.

210 STATE
*vs.*
TWINING.

SWAYZE, *J.*, Dissenting:

I think the words "false paper" in section 17 of the act concerning trust companies are used in the technical sense in which the words would naturally be used by men conversant with the business of banking, and refer to such paper as may constitute assets of the trust company,—promissory notes, checks, bonds, mortgages, cash items and paper of that character. The section evinces an intention to punish (1) the subscribing or making of a false statement of facts; (2) false entries in the books; (3) subscribing or exhibiting false paper. These three clauses seem to me mutually exclusive, and the document now in question naturally comes under the first class and not under the third.

The meaning of the words ought to be determined from the standpoint of those who drew the act at the time and not from the standpoint of the chance that happened. The legislature would naturally have thought of a document of this kind as a part of the recorded minutes and not as a loose paper, and could hardly have meant that every memorandum of the trust company might be a false paper within the meaning of a criminal statute like this.

It is the essential character of the document which ought to determine whether it comes within the definition of the crime denounced by the words "false paper." That essential character does not depend upon the form which the document chanced to take nor upon the material upon which it chanced to be written. If it had been a fictitious promissory note inscribed upon parchment, I think it would have been false paper, because of its essential character; and so I think it is not false paper when it is essentially a mere statement of facts intended to be recorded in the book of minutes where it naturally belongs.

I am authorized to say that Judge Dill concurs in this view.

211 New Jersey Court of Errors and Appeals.

THE STATE OF NEW JERSEY, Defendant in Error,
*vs.*
ALBERT C. TWINING and DAVID G. CORNELL, Plaintiffs in Error.

In Error to the Supreme Court.

DILL, *J.:*

I concur in the dissenting opinion of Mr. Justice Swayze, but I also think that there was no proof of exhibition within the meaning of the statute in question by the defendant Twining.

"Endorsed: Filed Dec. 31, 1906. S. D. Dickinson, Clerk."

[Endorsed:] State of New Jersey, Department of State. Comparing and Certifying Division. Copy correct. Compared by Johnson. Original read by Eppels. Hendricks in charge of division.

212 New Jersey Court of Errors and Appeals.

Between—

THE STATE OF NEW JERSEY, Defendant in Error,
*vs.*
ALBERT C. TWINING and DAVID C. CORNELL, Plaintiffs in Error.

On Error from New Jersey Supreme Court.

*Order of Affirmance.*

This cause coming on to be heard at the February Term, one thousand nine hundred and six, and being argued by H. M. Nevius, Prosecutor of the Pleas and Counsel for the Defendant in Error, and Messrs. Vredenburgh, Wall & Van Winkle, Collins & Corbin, Mr. Edward M. Colie and Mr. John G. Johnson, Counsel for the Plaintiffs in Error, and the Court having taken time to consider the same, and being of the opinion that the judgment of the Supreme Court shall be affirmed in all things—

It is now, on this twenty-fourth day of November, in the year of our Lord one thousand nine hundred and six, ordered, adjudged, and decreed, that the judgment of the Supreme Court be in all things affirmed with costs; and that the record and proceedings be remitted to the New Jersey Supreme Court, to be therein proceeded on according to law and the practice of said Court.

On motion of

H. M. NEVIUS,
*Prosecutor of Pleas and of Counsel for Defendant.*

[Endorsed:] State of New Jersey, Department of State. Comparing and Certifying Division. Copy correct. Compared by Fischer. Original read by Smith. Hendricks in charge of division.

213 STATE OF NEW JERSEY:

Court of Errors and Appeals, June Term, 1906.

In Error.

THE STATE
*and*
ALBERT C. TWINING and DAVID C. CORNELL.

No. 2 of March Term, 1906.
Date of decision, Nov. 19, 1906.
Chancellor presiding.
Opinion by Chancellor.

| Check list. | Affirm. | Rever'l. |
|---|---|---|
| The Chancellor | 1 | |
| Mr. Justice Garrison | 1 | |
| " " Pitney | 1 | |
| " " Swayze | | 1 |
| Judge Bogert | 1 | |
| " Vredenburgh | 1 | |
| " Green | 1 | |
| " Gray | 1 | |
| " Dill | | 1 |
| Totals | 7 | 2 |

214 The Court of Errors and Appeals in the Last Resort in all Causes of the State of New Jersey.

THE STATE OF NEW JERSEY, Defendant in Error,
*vs.*
ALBERT C. TWINING and DAVID C. CORNELL, Plaintiffs in Error.

In Error to the Supreme Court.

*Petition for Writ of Error out of the Supreme Court of the United States.*

Now come, Albert C. Twining and David C. Cornell, plaintiffs in error, by their respective attorneys, and say that on the first day of March, Nineteen Hundred and Four, they were convicted of a high misdemeanor in the Monmouth County Court of Quarter Sessions of the State of New Jersey, and that pursuant to said conviction on the third day of May, Nineteen Hundred and Four, a sentence was imposed upon the said Albert C. Twining of imprisonment in State's Prison for the term of six years at hard labor, and a sentence was imposed upon the said David C. Cornell of Imprisonment in State's Prison for the term of four years at hard labor; that the said Albert

C. Twining and David C. Cornell, prosecuted a writ of error in the Supreme Court of the State of New Jersey to review said judgment of the said Monmouth County Court of Quarter Sessions, and that subsequently the said Supreme Court affirmed said judgment; that on said judgment of the Supreme Court of the State of New Jersey, said Albert C. Twining and David C. Cornell, prosecuted a writ of error in the Court of Errors and Appeals in the Last Resort in all Causes of the State of New Jersey to review the said judgment, and that on the twenty-sixth day of November, Nineteen Hundred and Six, the Court of Errors and Appeals in the Last resort in all Causes of the State of New Jersey made and entered a final order and judgment herein, affirming the said judgment against the said Albert C. Twining and David C. Cornell.

215 The plaintiffs in error say, that in said final judgment of the said Court of Errors and Appeals in the Last Resort in all Causes of the State of New Jersey, and in the proceedings prior thereto in this cause, certain errors were committed to the prejudice of said plaintiffs in error, all of which will more in detail appear from the assignments of error, which are filed with and made a part hereof.

That the Court of Errors and Appeals in the Last Resort in all Causes of the State of New Jersey is the highest Court of said State of New Jersey in which a decision in this cause can be had.

Therefore, your petitioners pray, that a writ of error may issue in their behalf from the Supreme Court of the United States to the Court of Errors and Appeals in the Last Resort in all Causes of the State of New Jersey, the Supreme Court of New Jersey, and the Monmouth County Court of Quarter Sessions of the State of New Jersey, for the correction of the errors and reversal of the judgment as complained of; that the transcript of the record and all papers in this cause, duly authenticated, may be sent to the said Supreme Court of the United States; that said writ of error operate as a supersedeas; that the amount of security, if any, which the petitioner shall give and furnish on said writ of error may be fixed, and that all further proceedings in said Courts be suspended and stayed until the determination of said writ of error by the Supreme Court of the United States.

Dated this 28th day of November, 1906.

ALBERT C. TWINING.
DAVID C. CORNELL.

EDWARD M. COLIE,
*Att'y of Albert C. Twining.*
MARSHALL VAN WINKLE,
*Att'y of David C. Cornell.*
WILLIAM LINDSAY AND
EDWIN L. KALISH,
*Att'ys for Defendants.*

The writ of error as prayed for in the foregoing petition is hereby allowed with an order of supersedeas staying the enforcement of

the judgment herein until the plaintiffs in error can be
216 heard in this Court, upon the execution of a bond by the said plaintiffs in error, with proper surety in the sum of One Thousand Dollars.

Dated the 3d day of December, 1906.

EDWARD D. WHITE,
*Associate Justice Supreme Court U. S.*

The Court of Errors and Appeals in the Last Resort in All Causes of the State of New Jersey.

THE STATE OF NEW JERSEY, Defendant *in* Error,
*vs.*
ALBERT C. TWINING and DAVID C. CORNELL, Plaintiff in Error.

*Assignments of Error.*

On Writ of Error from the Supreme Court of the United States.

Now Come, the said plaintiffs in error, and submit that in the record, proceedings, decision and final judgment of the Court of Errors and Appeals in the Last Resort in all Causes of the State of New Jersey in the above entitled matter, there is manifest error in this, to wit:

1. The Court erred in holding that there was no error prejudicial to the said Albert C. Twining and David C. Cornell, plaintiffs in error, or either of them, committed by the Monmouth County Court of Quarter Sessions of the State of New Jersey in the trial of said indictment, or in the judgment of the Supreme Court of New Jersey affirming the same, by reason of the fact that in charging the jury in the trial of said cause, the trial judge charged them as follows:

"But the fact that they (referring to the defendants) stay off the stand, having heard testimony which might be prejudicial to them, without availing themselves of the right to go upon the stand and contradict it, is sometimes a matter of significance.

217 And further:

"They simply had the right to go upon the stand and they have not availed themselves of it, and it may be that there is no necessity for them to go there. I leave that entirely to you."

And further:

"And yet (he, meaning David C. Cornell, one of the defendants) has sat here and not gone upon the stand to deny it, he was not called upon to go upon the stand and deny it, but he did not go upon the stand and deny it; and it is for you to take that into consideration."

And further:

"You must say that the fact that Cornell did not go upon the stand has no significance; you may say so because the circumstances may be such that there should be no inference drawn of guilt, or

anything of that kind, from the fact that he did not go upon the stand; because a man does not go upon the stand you are not necessarily justified in drawing an inference of guilt, but you have a right to consider the fact that he does not go upon the stand where a direct accusation is made against him."

Whereas by the said charge, and by said judgment of the Court of Errors and Appeals in the Last resort in all Causes of the State of New Jersey, there was violated the Fourteenth Amendment of the Constitution of the United States, in that thereby the privileges and immunities of the said Albert C. Twining and David C. Cornell, citizens of the United States, were abridged, in that the said Albert C. Twining and David C. Cornell were thereby deprived of the fundamental right and immunity not to be compelled to testify or be witnesses against themselves or called on in the presence of the trial jury to testify or be witnesses against themselves, or to furnish or to be called on in the presence of said jury to furnish testimony or evidence against themselves, or to be witnesses against themselves in the trial of a prosecution like this involving their liberty and property.

218 2. The Court erred in holding that there was no error prejudicial to the said Albert C. Twining and David C. Cornell, plaintiffs in error, or either of them, committed by the Monmouth County Court of Quarter Sessions of the State of New Jersey in the trial of said indictment or in the judgment of the Supreme Court of New Jersey affirming the same, by reason of the fact that in charging the jury in the trial of said cause, the trial judge charged them as follows:

"But the fact that they (referring to the defendants) stay off the stand, having heard testimony which might be prejudicial to them, without availing *themselves* of the right to go upon the stand and contradict it, is sometimes a matter of significance." And further:

"They simply had the right to go upon the stand, and they have not availed themselves of it, and it may be that there is no necessity for them to go there. I leave that entirely to you." And further:

"And yet he (meaning David C. Cornell, one of the defendants) has sat here and not gone upon the stand to deny it; he was not called upon to go upon the stand and deny it, but he did not go upon the stand and deny it; and it is for you to take that into consideration." And further:

"You must say that the fact that Cornell did not go upon the stand has no significance; you may say so because the circumstances may be such that there should be no inference drawn of guilt, or anything of that kind, from the fact that he did not go upon the stand; because a man does not go upon the stand you are not necessarily justified in drawing an inference of guilt, but you have a right to consider the fact that he does not go upon the stand where a direct accusation is made against him."

Whereas by the said charge and by said judgment of the Court of Errors and Appeals in the Last Resort in all Causes of the State of New Jersey, the said Albert C. Twining and David C. Cornell were

deprived of the fundamental right and immunity not to be
219 compelled to testify or be witnesses against themselves or called on in the presence of the trial jury to testify or be witnesses against themselves or to furnish or be called on in the presence of the said jury to furnish testimony or evidence against themselves, or to be witnesses against *the-selves* in the trial of a prosecution like this involving their liberty and property; and the Fourteenth Amendment of the Constitution of the United States was violated, in that thereby the said Albert C. Twining and David C. Cornell were deprived of their liberty and property without due process of law guaranteed by said amendment of the Constitution.

3. The Court erred in holding that there was no error prejudicial to the said Albert C. Twining and David C. Cornell, plaintiffs in error, or either of them, committed by the Monmouth County Court of Quarter Sessions of the State of New Jersey in the trial of said indictment or in the judgment of the Supreme Court of New Jersey, affirming the same, by reason of the fact that in charging the jury in the trial of said cause the trial judge charged them as follows:

"But the fact that they (referring to the defendants) stay off the stand, having heard testimony which might be prejudicial to them, without availing themselves of the right to go upon the stand and contradict it, is sometimes a matter of significance."

And further:

"They simply had the right to go upon the stand and they have not availed themselves of it, and it may be that there is no necessity for them to go there. I leave that entirely to you."

And further:

"And yet he (meaning David C. Cornell), one of the defendants, has sat here and not gone upon the stand to deny it; he was not called upon to go upon the stand and deny it, but he did not go upon the stand and deny it; and it is for you to take that into consideration."

220 And further:

"You must say that the fact that Cornell did not go upon the stand has no significance; you may say so because the circumstances may be such that there should be no inference drawn of guilt, or anything of that kind, from the fact that he did not go upon the stand; because a man does not go upon the stand you are not necessarily justified in drawing an inference of guilt, but you have a right to consider the fact that he does not go upon the stand where a direct accusation is made against him."

Whereas by the said charge, and by said judgment of the Court of Errors and Appeals in the Last Resort in all Causes of the State of New Jersey, the said Albert C. Twining and David C. Cornell were deprived of the fundamental right and immunity not to be compelled to testify or be witnesses against themselves or called on in the presence of the trial jury to testify or be witnesses against themselves, or to furnish or to be called on in the presence of said jury to furnish testimony or evidence against themselves in the trial of a prosecution like this involving their liberty and property;

and the Fourteenth Amendment of the Constitution of the United States was violated in that thereby the said Albert C. Twining and David C. Cornell were denied the equal protection of the laws, guaranteed by said amendment of the Constitution.

4. The Court erred in holding that there was no error prejudicial to the said Albert C. Twining and David C. Cornell, plaintiffs in error, or either of them, committed by the Monmouth County Court of Quarter Sessions of the State of New Jersey in the trial of said indictment, or in the judgment of the Supreme Court of New Jersey, affirming the same by reason of the fact that in charging the jury in the trial of said cause the trial judge charged in addition to and in intimate connection with the language of the charge heretofore quoted in the foregoing Assignments of Error, as follows, so much of the charge as had been set forth in the previous assignments
221 of error being reproduced in brackets:

"Now, Twining and Cornell, this paper says were present. They are here in Court and have seen this paper offered in evidence and they know that this paper says that they were the two men, or two of the men who were present.

Neither of them has gone upon the stand to deny that they were present, or to show that the meeting was held.

"Now, it is not necessary for these men to prove their innocence. It is not necessary for them to prove that this meeting was held. (But the fact that they stay off the stand, having heard testimony which might be prejudicial to them, without availing themselves of the right to go upon the stand and contradict it, is sometimes a matter of significance.)

"Now, of course in this action, I do not see how that can have much weight, because these men deny that they exhibited the paper, and if one of these men exhibited the paper and the other did not, I do not see how you could say that the person who claims he did not exhibit the paper would be under any obligation at all to go upon the stand.

Neither is under any obligation. It is simply a right they have to go upon the stand, and, consequently the fact that they do not go upon the stand to contradict this statement in the minutes, they both denying through their counsel and through their plea, that they exhibited the paper, I do not see that that can be taken as at all prejudicial to either of them. They simply have the right to go upon the stand and they have not availed themselves [illegible], and it may be that there is no necessity for them to go there.

I leave that entirely to you."

And further:

"Now, gentlemen, if you believe that that is so; if you believe this testimony that Cornell did direct this man's attention to it—Cornell has sat here and heard that testimony and not denied it—nobody could misunderstand the import of that testimony, it was a direct accusation made against him of his guilt—if you believe
222 that testimony beyond a reasonable doubt, Cornell is guilty. (And yet he has sat here and not gone upon the stand to

deny it. He was not called upon to go upon the stand and deny it but he did not go upon the stand and deny it and it is for you to take that into consideration.)

"Now, Twining has also sat here and heard this testimony, but you will observe that there is this distinction as to the conduct of these two men in this respect. The accusation against Cornell was specific by Vreedenberg. It is rather inferential, if at all, against Twining, and he might say—it is for you to say whether he might say, "Well I don't think the accusation against me is made with such a degree of certainty as to require me to deny it, and I shall not; nobody will think it strange if I do not go upon the stand to deny it because Vreedenberg is uncertain as to whether I was there; he won't swear that I was there." So, consequently the fact that Twining did not go upon the stand can have no significance at all.

"(You must say that the fact that Cornell did not go upon the stand has no significance. You may say so, because the circumstances may be such that there should be no inference drawn of guilt or anything of that kind from the fact that he did not go upon the stand. Because a man does not go upon the stand you are not necessarily justified in drawing an inference of guilt. But you have a right to consider the fact that he does not go upon the stand where a direct accusation is made against him.)"

Whereas by the said charge, and by said judgment of the Court of Errors and Appeals in the Last Resort in all Causes of the State of New Jersey, there was violated the Fourteenth Amendment of the Constitution of the United States, in that thereby the privileges and immunities of the said Albert C. Twining and David C. Cornell, citizens of the United States, were abridged, in that the said Albert C. Twining and David C. Cornell were thereby deprived of the
223 fundamental right and immunity not to be compelled to testify or be witnesses against themselves or called on in the presence of the trial jury to testify or be witnesses against themselv or to furnish or to be called on in the presence of said jury to furnish testimony or evidence against themselves, or to be witnesses against themselves in the trial of a prosecution like this involving their liberty and property.

5. The Court erred in holding that there was no error prejudicial to the said Albert C. Twining and David C. Cornell, Plaintiffs in error, or either of them, committed by the Monmouth County Court of Quarter Sessions of the State of New Jersey in the trial of said indictment, or in the judgment of the Supreme Court of New Jersey, affirming the same by reason of the fact that in charging the jury in the trial of said cause the trial judge charged in addition to and in intimate connection with the language of the charge heretofore quoted in the foregoing assignments of Error, as follows, so much of the charge as had been set forth in the previous assignments of error being reproduced in brackets:

"Now, Twining and Cornell, this paper says were present. They are here in Court and have seen this paper offered in evidence and they know that this paper says that they were the two men, or two of

the men, who were present. Neither of them has gone upon the stand to deny that they were present, or to show that the meeting was held.

"Now, it is not necessary for these men to prove their innocence. It is not necessary for them to prove that this meeting was held. (But the fact that they stay off the stand, having heard testimony which might be prejudicial to them, without availing themselves of the right to go upon the stand and contradict it, is sometimes a matter of significance.)

224 "Now, of course in this action, I do not see how that can have much weight, because these men deny that they exhibited the paper, and if one of these men exhibited the paper and the other did not, I do not see how you could say that the person who claims he did not exhibit the paper would be under any obligation at all to go upon the stand. Neither is under any obligation. It is simply a right they have to go upon the stand, and, consequently the fact that they do not go upon the stand to contradict this statement to the minutes, they both denying through their counsel and through their plea, that they exhibited the paper, I do not see that that can be taken as at all prejudicial to either of them. They simply have the right to go upon the stand and they have not availed themselves of it, and it may be that there is no necessity for them to go there.

I leave that entirely to you."

And further:

"Now, gentlemen, if you believe that that is so; if you believe this testimony that Cornell did direct this man's attention to it—Cornell has sat here and heard that testimony and not denied it—nobody could misunderstand the import of that testimony, it was a direct accusation made against him of his guilt—if you believe that testimony beyond a reasonable doubt, Cornell is guilty. (And yet he has sat here and not gone upon the stand to deny it. He was not called upon to go upon the stand and deny it but he did not go upon the stand and deny it and it is for you to take that into consideration.)

"Now, Twining has also sat here and heard this testimony, but you will observe that there is this distinction as to the conduct of these two men in this respect: The accusation against Cornell was specific by Vreedenberg. It is rather inferential, if at all, against Twining, and he might say—it is for you to say whether he might say, "Well I don't think the accusation against me is made with such a degree of certainty as to require me to deny it, and I shall

225 not; nobody will think it strange if I do not go upon the stand to deny it because Vreedenberg is uncertain as to whether I was there; he won't swear that I was there." So, consequently the fact that Twining did not go upon the stand can have no significance at all.

"(You must say that the fact that Cornell did not go upon the stand has no significance. You may say so, because the circumstances may be such that there should be no inference drawn of guilt or anything of that kind from the fact that he did not go upon

the stand. Because a man does not go upon the stand you are not necessarily justified in drawing an inference of guilt. But you have a right to consider the fact that he does not go upon the stand where a direct accusation is made against him.)"

Whereas by said charge and by said judgment of the Court of Errors and Appeals in the Last Resort in all Causes of the State of New Jersey, the said Albert C. Twining and David C. Cornell were deprived of the fundamental right and immunity not to be compelled to testify or be witnesses against themselves or called on in the presence of the trial jury to testify or be witnesses against themselves, or to furnish or to be called on in the presence of said jury to furnish testimony or evidence against themselves, or to be witnesses against themselves in the trial of a prosecution like this involving their liberty and property; and the Fourteenth Amendment of the Constitution of the United States was violated in that thereby the said Albert C. Twining and David C. Cornell were deprived of their liberty and property, without due process of law guaranteed by said Amendment of the Constitution.

6. The Court erred in holding that there was no error prejudicial to the said Albert C. Twining and David C. Cornell, plaintiffs in error, or either of them, committed by the Monmouth County Court of Quarter Sessions of the State of New Jersey in the trial of said indictment, or in the judgment of the Supreme Court of New
226 Jersey, affirming the same by reason of the fact that in charging the jury in the trial of said cause the trial judge charged in addition to and in intimate connection with the language of the charge heretofore quoted in the foregoing Assignments of Errors, as follows, so much of the charge as had been set forth in the previous assignments of error being reproduced in brackets:

"Now, Twining and Cornell, this paper says were present. They are here in Court and have seen this paper offered in evidence and they know that this paper says that they were the two men, or two of the men, who were present. Neither of them has gone upon the stand to deny that they were present, or to show that the meeting was held.

"Now it is not necessary for these men to prove their innocence. It is not necessary for them to prove that this meeting was held. (But the fact that they stay off the stand, having heard testimony which might be prejudicial to them, without availing themselves of the right to go upon the stand and to contradict it, is sometimes a matter of significance.)"

"Now, of course in this action, I do not see how that can have much weight, because these men deny that they exhibited the paper, and if one of these men exhibited the paper and the other did not, I do not see how you could say that the person who claims he did not exhibit the paper would be under any obligation at all to go upon the stand. Neither is under any obligation. It is simply a right they have to go upon the stand, and, consequently the fact that they do not go upon the stand to contradict this statement in the minutes, they both denying through their counsel and through their plea,

that they exhibited the paper, I do not see that that can be taken as at all prejudicial to either of them. They simply have the right to go upon the stand and they have not availed themselves of it, and it may be that there is no necessity for them to go there.

I leave that entirely to you."

227 And further:

"Now, gentlemen, if you believe that that is so; if you believe this testimony that Cornell did direct this man's attention to it—Cornell has sat here and heard that testimony and not denied it—nobody could misunderstand the import of that testimony, it was a direct accusation made against him of his guilt—if you believe that testimony beyond a reasonable doubt, Cornell is guilty. (And yet he has sat here and not gone upon the stand to deny it. He was not called upon to go upon the stand and deny it but he did not go upon the stand and deny it and it is for you take that into consideration.)

"Now, Twining has also sat here and heard this testimony, but you will observe that there is this distinction as to the conduct of these two men in this respect: The accusation against Cornell was specific by Vreedenberg. It is rather inferential, if at all, against Twining, and he might say—it is for you to say whether he might say, "Well, I don't think the accusation against me is made with such a degree of certainty as to require me to deny it, and I shall not; nobody will think it strange if I do not go upon the stand to deny it because Vreedenberg is uncertain as to whether I was there; he won't swear that I was there." So, consequently the fact that Twining did not go upon the stand can have no significance at all.

"(You must say that the fact that Cornell did not go upon the stand has no significance. You may say so, because the circumstances may be such that there should be no inference drawn of guilt or anything of that kind from the fact that he did not go upon the stand. Because a man does not go upon the stand you are not necessarily justified in drawing an inference of guilt. But you have a right to consider the fact that he does not go upon the stand where a direct accusation is made against him.)"

228 Whereas by the said charge, and by said judgment of the Court of Errors and Appeals in the Last Resort in all Causes of the State of New Jersey, the said Albert C. Twining and David C. Cornell were deprived of the fundamental right and immunity not to be compelled to testify or be witnesses against themselves or called on in the presence of the trial jury to testify or be witnesses against themselves, or to furnish or to be called on in the presence of said jury to furnish testimony or evidence against themselves in the trial of a prosecution like this involving their liberty and property; and the Fourteenth Amendment of the Constitution of the United States was violated in that thereby the said Albert C. Twining and David C. Cornell were denied the equal protection of the laws guaranteed by said amendment of the Constitution.

Wherefore the said Albert C. Twining and David C. Cornell state and claim that the due process of law was not observed in

their trial and conviction, and that the equal protection of the laws was denied them, and their privileges and immunities as citizens of the United States and of the State of New Jersey were disregarded, abridged and violated on their trial, and that their conviction and all the steps leading up to the same, including the judgment of the Court of Errors and Appeals in the Last Resort in all Causes of the State of New Jersey are null and void because they are, and were, in violation of the aforesaid provisions of the Constitution of the United States, and they pray that the same may be reversed, annulled and altogether held for naught, and that the said Albert C. Twining and David C. Cornell may be restored to all things which they have lost because of the same.

ALBERT C. TWINING,
DAVID C. CORNELL,
*Defendants.*
WILLIAM LINDSAY AND
EDWIN L. KALISH,
*Att'ys for Defendants.*

EDWARD M. COLIE,
*Att'y of Albert C. Twining.*
MARSHALL VAN WINKLE,
*Att'y of David C. Cornell.*

[Endorsed:] State of New Jersey, Department of State. Comparing and Certifying Division. Copy correct. Compared by E. Fisher. Original read by H. M. Dolton. J. L. Hendricks, in charge of division.

229 The Court of Errors and Appeals in the Last Resort in all Causes of the State of New Jersey.

THE STATE OF NEW JERSEY, Defendant in Error,
*vs.*
ALBERT C. TWINING and DAVID C. CORNELL, Plaintiffs in Error.

Know all men by these presents, that we, Albert C. Twining and David C. Cornell, principals, and American Surety Company of New York, surety, are held and firmly bound unto the State of New Jersey, in the sum of One Thousand Dollars ($1,000), to be paid to the said State of New Jersey and its assigns, to the payment of which well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 28th day of November, A. D. One Thousand Nine Hundred and Six.

Whereas, the above named Albert C. Twining and David C. Cornell, plaintiffs in error, have prosecuted a writ of error in the Supreme Court of the United States, to reverse the judgment rendered in the above entitled action by the Court of Errors and Appeals in the Last Resort in all Causes of the State of New Jersey.

Now, therefore, the condition of this obligation is such, that if the above named plaintiffs in error shall prosecute their said writ of error to effect and answer all costs and damages, if they shall fail to make good their plea, then this obligation to be void; otherwise, to remain in full force and effect.

ALBERT C. TWINING. [L. S.]
DAVID C. CORNELL. [L. S.]
AMERICAN SURETY COMPANY
OF NEW YORK,
By L. E. CARMAN, *Vice President.*

[SEAL.]

Attest: J. C. DRAPER, JR., *Attorney.*

230 224120. CTM.

STATE OF NEW YORK, *County of New York, ss:*

On this 28th day of November, 1906, before me personally appeared Albert C. Twining, known to me to be one of the persons described in and who executed the foregoing bond, and acknowledged that he executed the same as his free act and deed.

ALEX'R S. ANDREWS,
[L. S.] *Notary Public, Queens County.*

Certificate filed in New York Co.

STATE OF NEW YORK, *County of New York, ss:*

On this 28th day of November, 1906, before me personally appeared David C. Cornell, known to me to be one of the persons described in and who executed the foregoing bond, and acknowledged that he executed the same as his free act and deed.

ALEX'R S. ANDREWS,
[L. S.] *Notary Public, Queens County.*

Certificate filed in New York Co.

STATE OF NEW YORK, *County of New York, ss:*

On this 30th day of November, A. D. Nineteen Hundred and Six, personally appeared before me L. E. Carman, who being duly sworn deposes and says that he is the Vice-President of the American Surety Company of New York, the corporation that executed the foregoing instrument, that the seal affixed to the foregoing instrument is the corporate seal of said Corporation, and that said instrument was signed and sealed on behalf of said Corporation by authority of its Board of Directors and that said L. E. Carman acknowledged said instrument to be the free act and deed of said Corporation.

L. E. CARMAN.

ALEX'R S. ANDREWS,
*Notary Public, Queens County.*

Certificate filed in New York County.

STATE OF NEW YORK, *County of New York, ss:*

I, Peter J. Dooling, Clerk of the County of New York, and
231 also Clerk of the Supreme Court for the said County, the same being a Court of Record, do hereby certify, that Alex'r S. Andrews has filed in the Clerk's Office of the County of New York, a certified copy of his appointment and qualification as Notary Public for the County of Queens, with his autograph signature, and was at the time of taking the proof or acknowledgment of the annexed instrument, duly authorized to take the same. And further that I am well acquainted with the handwriting of such Notary, and believe the signature to the said certificate of proof or acknowledgment to be genuine.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Court and County, the 30 day of Nov. 1906.

[SEAL.] PETER J. DOOLING, *Clerk.*

I hereby approve the foregoing bond and surety this third day of December, A. D. Nineteen Hundred and Six.

EDWARD D. WHITE,
*Associate Justice of the Supreme Court of the United States.*

STATE, CITY, AND COUNTY OF NEW YORK, *ss:*

On this 28th day of November, 1906, before me, the subscriber, a Foreign Commissioner of Deeds for the State of New Jersey, in the State of New York, duly commissioned and sworn, personally came J. C. Draper, Jr., who, being by me duly sworn, on his oath, saith: That he is one of the Attorneys of the American Surety Company of New York, of the State of New York, and that he resides in the City of New York; that he knows L. E. Carman, Vice President of the American Surety Company of New York, and he knows too, the corporate seal of the said Company, and that the seal affixed to the foregoing instrument is such corporate seal; and that it was affixed by the said Vice President and the said instrument signed by the said Vice President as Vice President of said Company, attested by deponent as Attorney by order of the Board of Trustees of said Company, in deponent's presence, as the voluntary act and deed of said Company, that said Company has duly complied
232 with all the requirements of Chapter 184 of the Laws of the State of New Jersey of the year 1895; that the good available assets of the Company exceed its liabilities, as such liabilities are ascertained in the manner provided in said Chapter; that the American Surety Company of New York is duly incorporated under the laws of the State of New York; and is authorized by the laws of that State and under its charter to become surety on bonds and obligations such as are mentioned in said Chapter; that it has on deposit with the Comptroller of the State of New Jersey at least Fifty Thousand Dollars ($50,000) in good securities worth at par and market value at least that sum, and held for the benefit of the holders of the

obligations of such Company; and also has on deposit with the Superintendent of Insurance of the State of New York, good securities worth at par and at market value at least Two Hundred Thousand Dollars ($200,000) held for the security of its obligations and has a fully paid up, safely invested, and unimpaired capital of Two Million, Five Hundred Thousand Dollars; and said Company has appointed Francis B. Lee, of the City of Trenton, as its Attorney in the State of New Jersey, upon whom process of Law can be served, and has filed in the office of the Commissioner of Banking and Insurance, a written instrument duly signed and sealed, certifying such appointment, together with the residence and office of such attorney, within the State of New Jersey; and that the following is a true copy of a Resolution of the Board of Trustees of the said American Surety Company of New York, passed on the 12th day of April, 1893, at its regular Quarterly Meeting, and still in full force and effect, to wit:

"Resolved, That the President and the Vice-Presidents be and they hereby are, and each one of them is authorized and empowered to execute and deliver and attach the seal of the Company to any and all bonds and undertakings for or on behalf of the Company in its business of guaranteeing the performance of contracts other than insurance policies, and executing or guaranteeing bonds and
233 undertakings required or permitted in all actions or proceedings by law allowed; such guarantees, bonds and undertakings, however, to be attested in every instance by the Secretary, one of the Assistant Secretaries, or one of the Attorneys."

J. C. DRAPER, JR., *Attorney.*

Sworn and Subscribed in the City of New York, in the County and State of New York, this 28th day of November, A. D. 1906, before me, a Foreign Commissioner of Deeds for the State of New Jersey in the State of New York, duly commissioned and sworn.

[SEAL.] E. F. WATSON,
*A Foreign Commissioner of Deeds for New Jersey in New York.*

STATE AND COUNTY OF NEW YORK, *ss:*

On this 28th day of Nov. 1906, before me personally appeared L. E. Carman, Vice President of the American Surety Company of New York, to me known, who being by me duly sworn, did depose and say that he resided in Nutley, N. J. that he is the Vice President of the American Surety Company of New York, the Corporation described in and which executed the above instrument; that he knew the corporate seal of said Corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of Directors of said Corporation, and that he signed his name thereto by like order; and that the liabilities of said Corporation do not exceed its assets as ascertained in the manner provided by law. And the said L. E. Carman further said that he was acquainted with J. C. Draper, Jr., and knew him to be one of the

Attorneys of said Corporation, that the signature to said J. C. Draper, Jr., subscribed to the said instrument, is in the genuine handwriting of the said J. C. Draper, Jr., and was thereto subscribed by the like order of the said Board of Directors, and in the presence of him the said L. E. Carman, Vice President.

MARSHALL L. BROWER,
[L. S.] *Notary Public, New York County.*

Certificate filed in all Counties.

STATE OF NEW YORK, *County of New York, ss:*

234 I, Peter J. Dooling, Clerk of the County of New York, and also Clerk of the Supreme Court for the said County, the same being a Court of Record, do hereby certify, That Marshall L. Brower, whose name is subscribed to the Certificate of the proof or acknowledgment of the annexed instrument, and thereon written, was, at the time of taking such proof or acknowledgment, a Notary Public in and for the County of New York, dwelling in the said County, commissioned and sworn, and duly authorized to take the same. And further that I am well acquainted with the handwriting of such Notary, and verily believe that the signature to the said certificate of proof or acknowledgment is genuine.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Court and County, the 30 day of Nov. 1906.

[SEAL.] PETER J. DOOLING, *Clerk.*

At a regular quarterly meeting of the Board of Trustees of the American Surety Company of New York, held on the 12th day of April, 1893, the following resolution was adopted and is still in force:

"Resolved, That the President and Vice-Presidents be and they hereby are, and each one of them is authorized and empowered to execute and deliver, and attach the seal of the Company to any and all bonds and undertakings for, or on behalf of the Company, in its business of guaranteeing the performance of contracts other than insurance policies, and executing or guaranteeing bonds and undertakings required or permitted in all actions or proceedings by law allowed; such guarantee, bonds and undertakings, however, to be attested in every instance by the Secretary, one of the Assistant Secretaries or one of the Attorneys."

COUNTY OF NEW YORK, *ss:*

I, J. C. Draper, Jr., Attorney of the American Surety Company of New York, have compared the foregoing Resolution with the original thereof, as recorded in the Minute Book of said Company, and do certify that the same is a correct and true transcript there-
235 from, and of the whole of said original Resolution.

Given under my hand and the seal of the Company at the City of New York, this 28th day of Nov. 1906.

[SEAL.] J. C. DRAPER, JR., *Attorney.*

[Endorsed:] State of New Jersey, Department of State. Comparing and Certifying Division. Copy correct. Compared by J. L. Hendricks. Original Read by E. F. Fisher. J. L. Hendricks, in charge of Division.

236 STATE OF NEW JERSEY:

I, S. D. Dickinson, Secretary of State of the State of New Jersey and *Ex-Officio* Clerk of the Court of Errors and Appeals, do hereby certify that the original bond in the case of Albert C. Twining and David C. Cornell, Plaintiffs in Error and the State of New Jersey, Defendant in error, was lodged in this office on the third day of December, nineteen hundred and six.

In testimony whereof I have hereunto set my hand and affixed my Official seal, at Trenton, this twenty-ninth day of December, A. D. 1906.

[Seal of the Secretary of the State of New Jersey.]

S. D. DICKINSON, *Clerk.*

237 UNITED STATES OF AMERICA, *ss:*

To the State of New Jersey, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Court of Errors and Appeals of the State of New Jersey wherein Albert C. Twining and David C. Cornell are plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edward D. White, Associate Justice of the Supreme Court of the United States, this third day of December, in the year of our Lord one thousand nine hundred and six.

EDWARD D. WHITE,
*Associate Justice of the Supreme Court of the United States.*

238 Due and legal service of a copy of this paper is hereby acknowledged for the State of New Jersey this 12th day of December 1906.

H. M. NEVIUS,
*Prosecutor of the Pleas for Monmouth Co., N. J.*

239 UNITED STATES OF AMERICA, ss:

[Seal of the Supreme Court of the United States.]

The President of the United States of America, to the Honorable the Judges of the Court of Errors and Appeals of the State of New Jersey, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Errors and Appeals before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Albert C. Twining and David C. Cornell, plaintiffs in error, and The State of New Jersey, defendant in error, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity;

240 or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said plaintiffs in error as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the third day of December, in the year of our Lord one thousand nine hundred and six.

JAMES H. McKENNEY,
*Clerk of the Supreme Court of the United States.*

Allowed by
EDWARD D. WHITE,
*Associate Justice of the Supreme Court of the United States.*

241 STATE OF NEW JERSEY:

I, S. D. Dickinson, Secretary of State of the State of New Jersey, and *Ex-Officio* Clerk of the Court of Errors and Appeals, do hereby certify, that the original Writ of Error in the case of Albert C. Twin-

ing and David C. Cornell Plaintiffs in Error and the State of New Jersey, Defendant in Error, was lodged in this office on the Third day of December, nineteen hundred and six, together with a copy thereof for the Defendant in Error, the State of New Jersey.

In testimony whereof, I have hereunto set my hand and affixed my Official Seal, at Trenton, this Twenty-ninth day of December, A. D. 1906.

[Seal of the Secretary of the State of New Jersey.]

S. D. DICKINSON, *Clerk.*

242 STATE OF NEW JERSEY:

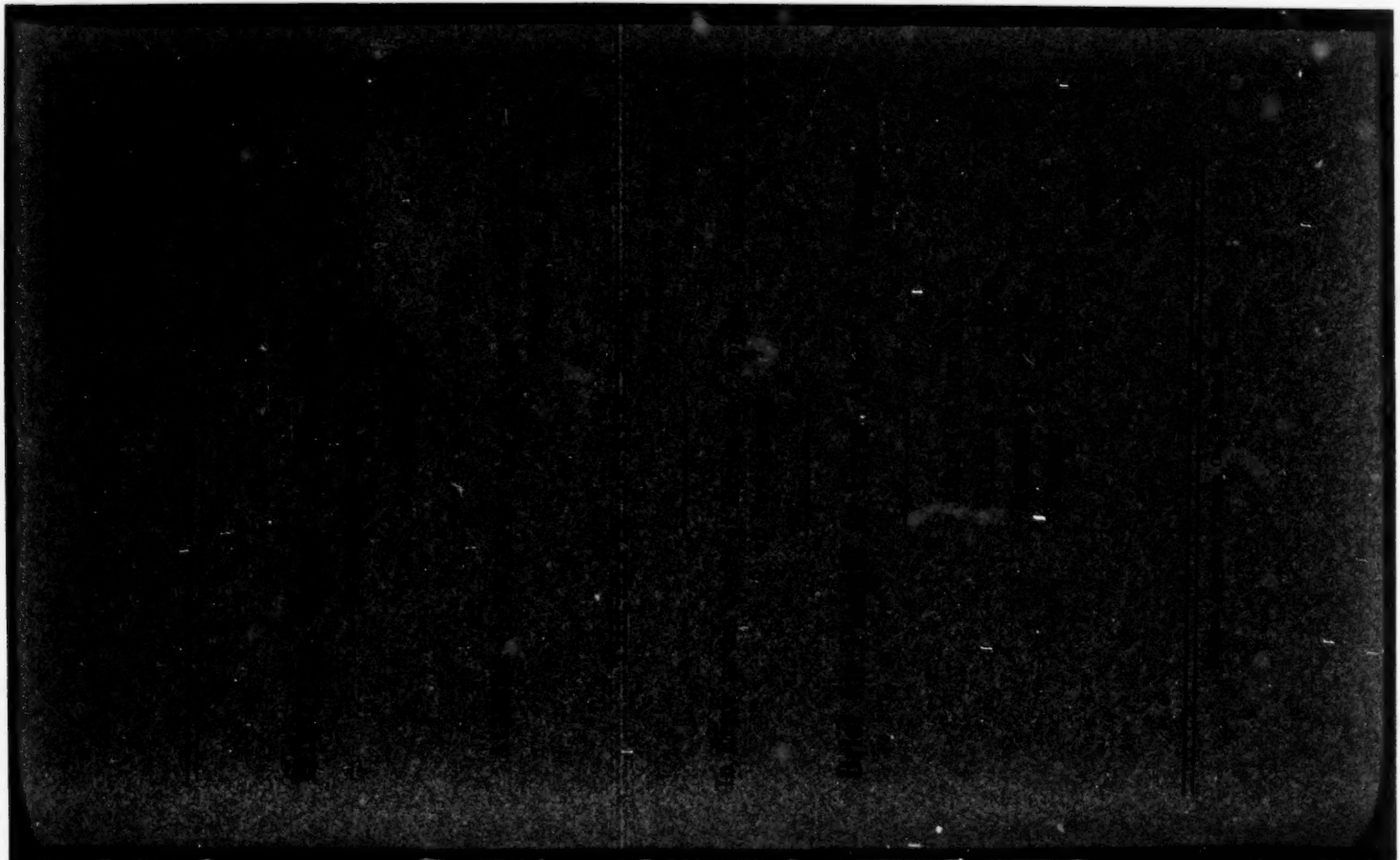
In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within-entitled cause, with all things concerning the same.

Witness my hand and the seal of the New Jersey Court of Errors and Appeals, this 31st day of December, A. D. 1906.

[Seal of the Secretary of the State of New Jersey.]

S. D. DICKINSON, *Clerk.*

Endorsed on cover: File No. 20,508. New Jersey court of errors and appeals. Term No. 187. Albert C. Twining and David C. Cornell, plaintiffs in error, *vs.* The State of New Jersey. Filed January 4th, 1907. File No. 20,508.



# Supreme Court of the United States,

OCTOBER TERM, 1907.

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|---|---|
| ALBERT C. TWINING and DAVID C. CORNELL, Plaintiffs in Error, against THE STATE OF NEW JERSEY, Defendant in Error. | No. 187. |

## BRIEF FOR ALBERT C. TWINING, PLAINTIFF IN ERROR.

### Statement.

This case comes before this Court on writ of error to the Court of Errors and Appeals of the State of New Jersey, to review an order of the Court of Errors and Appeals, affirming a judgment of the Supreme Court in that State, affirming the judgment of conviction of the Court of Quarter Sessions of the County of Monmouth, against the plaintiffs in error (the defendants below), entered upon a verdict rendered upon a trial in said Court, finding them guilty of knowingly exhibiting, presenting, and showing and causing to be exhibited, presented

and shown, a certain false paper more particularly set forth below.

See

Indictment, pages 4 and 5;
Judgment, pages 6 and 7;
Judgment of Affirmance, Supreme Court, page 130;
Order of Affirmance, Court of Errors and Appeals, page 146;
Petition for Writ of Error, page 147;
Writ of Error, page 163.

## Indictment.

The indictment charges the plaintiffs in error as follows:

"The Grand Inquest of the State of New Jersey for the body of the County of Monmouth, upon their respective oaths present:

"That Albert C. Twining and David C. Cornell, both late of the City of Asbury Park, in the said County of Monmouth, being directors and officers of the Monmouth Trust and Safe Deposit Company, a corporation duly organized and existing under the laws of this state, on the nineteenth day of January, in the year of our Lord nineteen hundred and three, fraudulently, wilfully and intentionally did take and appropriate to their own use the sum of thirty thousand and forty-eight dollars and seventy-seven cents, being the funds, money and property of the said Trust Company, and did use the said moneys, for the purpose of acquiring a large number of the certificates of shares of the capital stock of the First National Bank of Asbury Park, body corporate, organized under the laws of the United States of North America, said shares of stock being purchased and acquired for the sole use and benefit of the said Albert C. Twining and David C. Cornell

and not for the use and benefit of the said trust company.

"And the Grand Inquest further presents that the said Albert C. Twining and David C. Cornell, then and there each being a director and officer of the said trust company, body corporate, and intending to conceal the fact that they so appropriated, converted and misapplied the said sum of money, being the property of the said trust company as aforesaid, and intending to deceive any person authorized to examine as to the condition of such trust company and to conceal from such person the fact of the misappropriation, misuse, misapplication and conversion of the said funds of the said trust company as aforesaid by the said Albert C. Twining and David C. Cornell, and intending to deceive such person by making him believe that the said Albert C. Twining and David C. Cornell had used said funds of the trust company for the purpose of purchasing of three hundred and eighty-one shares of the stock of the First National Bank aforesaid, which stock was to be the property of the said trust company and not the property of the said Albert C. Twining and David C. Cornell, and intending to deceive such person so authorized to examine as to the condition of the *such* trust company, by making him believe that such purchase of stock and the use of said money had been authorized by a resolution passed at a special meeting of the Board of Directors of the said trust company held at the office of the company on the ninth day of February, nineteen hundred and three, the said Albert C. Twining and David C. Cornell, on the fourteenth day of February, in the year aforesaid, at the City of Asbury Park, in the county aforesaid, and within the jurisdiction of this court, they each being then and there a director and officer of the said trust company, with intent to deceive as aforesaid, Larue Vredenburg, he being a person authorized to examine as to the condition of such trust company, did knowingly

exhibit, present and show and cause to be exhibited, presented and shown to the said Larue Vredenburg, a certain false paper of the following tenor and effect, viz.:

"Monmouth Trust and Safe Deposit Company, Asbury Park, N. J.

"A special meeting of the Board of Directors of this company was held at the office of the company, Monday, February 9, 1903.

"There were present the following directors:

George F. Krochl, G. B. M. Harvey,
S. A. Patterson, A. C. Twining,
D. C. Cornell.

"The minutes of the regular meeting held Jan. 15th, 1903, were read, and on motion, duly approved.

"All loans taken since the last meeting were gone over carefully, and upon motion, duly seconded, were unanimously approved.

"A resolution that this company buy three hundred and eighty-one shares of the stock of the First National Bank, at $44,875, was adopted.

"On motion, the meeting adjourned.

"And the Grand Inquest further presents that there had been no special meeting of the Board of Directors of the Monmouth Trust and Safe Deposit Company held at the office of the company on Monday, the ninth day of February, nineteen hundred and three, and that no resolution or action of any kind had been taken by the directors of said company relative to the purchase by the said company of any of the shares of stock of the First National Bank, and that the said paper so presented, exhibited and shown, was false and fraudulent and that the said Albert C. Twining and David C. Cornell knew that it was false and fraudulent at the time of the exhibition, presenting and showing of it to the said Larue Vredenburg, contrary to the form of the statute in such case made and provided, and against the peace of this state, the government and dignity of the same."

See

Indictment, pages 4 and 3.

The plaintiff in error pleaded "not guilty," subsequently withdrawing such plea, to move to quash the indictment. This motion was denied, and the plaintiff in error again pleaded "not guilty," and stood trial, resulting in the verdict of guilty, upon which he was sentenced to six years imprisonment at hard labor.

## Statutes.

The provisions of the Laws of New Jersey under which the indictment was found and the conviction had, are as follows:

> "Every director, officer, agent or clerk of any trust company who wilfully and knowingly subscribes or makes any false statements of facts or false entries in the books of such trust company, or knowingly subscribes or exhibits any false paper, with intent to deceive any person authorized to examine as to the condition of such trust company, or wilfully or knowingly subscribes to or makes any false report, shall be guilty of a high misdemeanor and punished accordingly."

Sec. 17, Laws of 1899 (New Jersey), p. 450.

See

Record, page 125.

Upon the trial, testimony was given by one Larue R. Vredenburg, an examiner connected with the State Banking Department, to the effect that Cornell had stated to him that he would find the authority for the First National Bank stock transaction in the minutes of the Board of Directors. The minute book was handed to him

by Cornell in Twining's absence, and he found the alleged false paper in the minute book (pages 31 and 32).

Two of the directors, Tusting and Patterson, stated that they did not recollect attending any meeting although they were recited as present in the alleged minutes. The bank examiner, Vredenburg, and the stenographer, Miss Rittenhouse, would neither of them state positively that Mr. Twining was present on the 14th day of February, the date of the alleged exhibition, as charged in the indictment. The evidence in this particular is more fully set out below in Point IV.

Both of the plaintiffs in error rested at the close of the State's case, without introducing any evidence. In the summing up, the prosecutor addressed the jury as follows (p. 90):

> "and the uncontradicted testimony is, they got authority from the Board of Directors and that is not denied by either Twining or Cornell, and in passing I might say that neither is it contradicted that this paper was exhibited by Twining and Cornell. They have not taken the stand and told you under oath that they did not exhibit this paper."

And further, at page 94:

> "But, gentlemen, there were two men here who are alleged to have been present at that meeting, Messrs. Twining and Cornell, who could have taken the stand and who could have told you. On their oath they could both say that they were present at that meeting and that the resolution was adopted authorizing the purchase of this stock. Did they do it? And if they did not do it why didn't they do it? Can you find an answer?"

This was followed by the charge to the jury, contained in the following

## Assignments of Error.

1. The Court erred in holding that there was no error prejudicial to the said Albert C. Twining and David C. Cornell, plaintiffs in error, or either of them, committed by the Monmouth County Court of Quarter Sessions of the State of New Jersey in the trial of said indictment, or in the judgment of the Supreme Court of New Jersey affirming the same, by reason of the fact that in charging the jury in the trial of said cause, the trial judge charged them as follows:

> "But the fact that they (referring to the defendants) stay off the stand, having heard testimony which might be prejudicial to them, without availing themselves of the right to go upon the stand and contradict it, is sometimes a matter of significance."

And further:

> "They simply had the right to go upon the stand and they have not availed themselves of it, and it may be that there is no necessity for them to go there. I leave that entirely to you."

And further:

> "And yet he (meaning David C. Cornell, one of the defendants) has sat here and not gone upon the stand to deny it, he was not called upon to go upon the stand and deny it, but he did not go upon the stand and deny it; and it is for you to take that into consideration."

And further:

> "You must say that the fact that Cornell did not go upon the stand has no significance; you

> may say so because the circumstances may be such that there should be no inference drawn of guilt, or anything of that kind, from the fact that he did not go upon the stand; because a man does not go upon the stand you are not necessarily justified in drawing an inference of guilt, but you have a right to consider the fact that he does not go upon the stand where a direct accusation is made against him."

Whereas by the said charge, and by said judgment of the Court of Errors and Appeals in the Last Resort in all Causes of the State of New Jersey, there was violated the Fourteenth Amendment of the Constitution of the United States, in that thereby the privileges and immunities of the said Albert C. Twining and David C. Cornell, citizens of the United States were abridged, in that the said Albert C. Twining and David C. Cornell were thereby deprived of the fundamental right and immunity not to be compelled to testify or be witnesses against themselves or called on in the presence of the trial jury to testify or be witnesses against themselves or to furnish or to be called on in the presence of said jury to furnish testimony or evidence against themselves, or to be witnesses against themselves in the trial of a prosecution like this involving their liberty and property.

2. The Court erred in holding that there was no error prejudicial to the said Albert C. Twining and David C. Cornell, plaintiffs in error, or either of them, committed by the Monmouth County Court of Quarter Sessions of the State of New Jersey in the trial of said indictment or in the judgment of the Supreme Court of New Jersey affirming the same, by reason of the fact that in charging the jury in the trial of said cause, the trial judge charged them as follows:

> "But the fact that they (referring to the defendants) stay off the stand, having heard

testimony which might be prejudicial to them, without availing *themselves* of the right to go upon the stand and contradict it, is sometimes a matter of significance."

And further:

"They simply had the right to go upon the stand, and they have not availed themselves of it, and it may be that there is no necessity for them to go there. I leave that entirely to you."

And further:

"And yet he (meaning David C. Cornell, one of the defendants) has sat here and not gone upon the stand to deny it; he was not called upon to go upon the stand and deny it, but he did not go upon the stand and deny it; and it is for you to take that into consideration."

And further:

"You must say that the fact that Cornell did not go upon the stand has no signficance; you may say so because the circumstances may be such that there should be no inference drawn of guilt or anything of that kind, from the fact that he did not go upon the stand; because a man does not go upon the stand you are not necessarily justified in drawing an inference of guilt, but you have a right to consider the fact that he does not go upon the stand where a direct accusation is made against him."

Whereas, by the said charge and by said judgment of the Court of Errors and Appeals in the Last Resort in all Causes of the State of New Jersey, the said Albert C. Twining and David C. Cornell were deprived of the fundamental right and immunity not to be compelled to testify or be witnesses against themselves or called on in the presence of the trial jury to testify or be witnesses against themselves or to furnish or be called on in the presence of the said jury to furnish testimony

or evidence against themselves, or to be witnesses against *themselves* in the trial of a prosecution like this involving their liberty and property; and the Fourteenth Amendment of the Constitution of the United States was violated, in that thereby the said Albert C. Twining and David C. Cornell were deprived of their liberty and property without due process of law guaranteed by said amendment of the Constitution.

3. The Court erred in holding that there was no error prejudicial to the said Albert C. Twining and David C. Cornell, plaintiffs in error, or either of them, committed by the Monmouth County Court of Quarter Sessions of the State of New Jersey in the trial of said indictment or in the judgment of the Supreme Court of New Jersey affirming the same, by reason of the fact that in charging the jury in the trial of said cause the trial judge charged them as follows:

> "But the fact that they (referring to the defendants) stay off the stand, having heard testimony which might be prejudicial to them, without availing themselves of the right to go upon the stand and contradict it, is sometimes a matter of significance."

And further:

> "They simply had the right to go upon the stand and they have not availed themselves of it, and it may be that there is no necessity for them to go there. I leave that entirely to you."

And further:

> "And yet he (meaning David C. Cornell), one of the defendants, has sat here and not gone upon the stand to deny it; he was not called upon to go upon the stand and deny it, but he did not go upon the stand and deny it;

and it is for you to take that into consideration."

And further:

"You must say that the fact that Cornell did not go upon the stand has no significance; you may say so because the circumstances may be such that there should be no inference drawn of guilt, or anything of that kind, from the fact that he did not go upon the stand; because a man does not go upon the stand you are not necessarily justified in drawing an inference of guilt, but you have a right to consider the fact that he does not go upon the stand where a direct accusation is made against him."

Whereas by the said charge, and by said judgment of the Court of Errors and Appeals in the Last Resort in all Causes of the State of New Jersey, the said Albert C. Twining and David C. Cornell were deprived of the fundamental right and immunity not to be compelled to testify or be witnesses against themselves or called on in the presence of the trial jury to testify or be witnesses against themselves, or to furnish or to be called on in the presence of said jury to furnish testimony or evidence against themselves in the trial of a prosecution like this involving their liberty and property; and the Fourteenth Amendment of the Constitution of the United States was violated in that thereby the said Albert C. Twining and David C. Cornell were denied the equal protection of the laws, guaranteed by said amendment of the Constitution.

4. The Court erred in holding that there was no error prejudicial to the said Albert C. Twining and David C. Cornell, plaintiffs in error, or either of them, committed by the Monmouth County Court

of Quarter Sessions of the State of New Jersey in the trial of said indictment, or in the judgment of the Supreme Court of New Jersey, affirming the same by reason of the fact that in charging the jury in the trial of said cause the trial judge charged in addition to and in intimate connection with the language of the charge heretofore quoted in the foregoing Assignments of Error, as follows, so much of the charge as had been set forth in the previous assignments of error being reproduced in brackets:

> "Now, Twining and Cornell, this paper says were present. They are here in Court and have seen this paper offered in evidence and they know that this paper says that they were the two men, or two of the men who were present.
>
> Neither of them has gone upon the stand to deny that they were present, or to show that the meeting was held.
>
> Now, it is not necessary for these men to prove their innocence. It is not necessary for them to prove that this meeting was held. (But the fact that they stay off the stand, having heard testimony which might be prejudicial to them, without availing themselves of the right to go upon the stand and contradict it, is sometimes a matter of significance.)
>
> Now, of course in this action, I do not see how that can have much weight, because these men deny that they exhibited the paper, and if one of these men exhibited the paper and the other did not, I do not see how you could say that the person who claims he did not exhibit the paper would be under any obligation at all to go upon the stand.
>
> Neither is under any obligation. It is simply a right they have to go upon the stand, and, consequently the fact that they do not go upon the stand to contradict this statement in the minutes, they both denying through their counsel and through their plea, that they exhibited

the paper, I do not see that that can be taken as at all prejudicial to either of them. They simply have the right to go upon the stand and they have not availed themselves of it, and it may be that there is no necessity for them to go there.

I leave that entirely to you."

And further:

"Now, gentlemen, if you believe that that is so; if you believe this testimony that Cornell did direct this man's attention to it—Cornell has sat here and heard that testimony and not denied it—nobody could misunderstand the import of that testimony, it was a direct accusation made against him of his guilt—if you believe that testimony beyond a reasonable doubt, Cornell is guilty. (And yet he has sat here and not gone upon the stand to deny it. He was not called upon to go upon the stand and deny it but he did not go upon the stand and deny it and it is for you to take that into consideration.)

"Now, Twining has also sat here and heard this testimony, but you will observe that there is this distinction as to the conduct of these two men in this respect. The accusation against Cornell was specific by Vreedenberg. It is rather inferential, if at all, against Twining, and he might say—it is for you to say whether he might say, 'Well, I don't think the accusation against me is made with such a degree of certainty as to require me to deny it, and I shall not; nobody will think it strange if I do not go upon the stand to deny it because Vreedenberg is uncertain as to whether I was there; he won't swear that I was there.' So, consequently the fact that Twining did not go upon the stand can have no significance at all.

"(You must say that the fact that Cornell did not go upon the stand has no significance. You may say so, because the circumstances may be such that there should be no inference drawn of guilt or anything of that kind from

the fact that he did not go upon the stand. Because a man does not go upon the stand you are not necessarily justified in drawing an inference of guilt. But you have a right to consider the fact that he does not go upon the stand where a direct accusation is made against him.)"

Whereas by the said charge, and by said judgment of the Court of Errors and Appeals in the Last Resort in all Causes of the State of New Jersey, there was violated the Fourteenth Amendment of the Constitution of the United States, in that thereby the privileges and immunities of the said Albert C. Twining and David C. Cornell, citizens of the United States, were abridged, in that the said Albert C. Twining and David C. Cornell were thereby deprived of the fundamental right and immunity not to be compelled to testify or be witnesses against themselves or called on in the presence of the trial jury to testify or be witnesses against themselves, or to furnish or to be called on in the presence of said jury to furnish testimony or evidence against themselves, or to be witnesses against themselves in the trial of a prosecution like this involving their liberty and property.

5. The Court erred in holding that there was no error prejudicial to the said Albert C. Twining and David C. Cornell, plaintiffs in error, or either of them, committed by the Monmouth County Court of Quarter Sessions of the State of New Jersey in the trial of said indictment, or in the judgment of the Supreme Court of New Jersey, affirming the same by reason of the fact that in charging the jury in the trial of said cause the trial judge charged in addition to and in intimate connection with the language of the charge heretofore quoted in the foregoing Assignments of Error, as follows, so much

of the charge as had been set forth in the previous assignments of error being reproduced in brackets:

> "Now, Twining and Cornell, this paper says were present. They are here in court and have seen this paper offered in evidence and they know that this paper says that they were the two men, or two of the men, who were present. Neither of them has gone upon the stand to deny that they were present, or to show that the meeting was held.
>
> "Now, it is not necessary for these men to prove their innocence. It is not necessary for them to prove that this meeting was held. (But the fact that they stay off the stand, having heard testimony which might be prejudicial to them, without availing themselves of the right to go upon the stand and contradict it, is sometimes a matter of significance.)
>
> "Now, of course in this action, I do not see how that can have much weight, because these men deny that they exhibited the paper, and if one of these men exhibited the paper and the other did not, I do not see how you could say that the person who claims he did not exhibit the paper could be under any obligation at all to go upon the stand. Neither is under any obligation. It is simply a right they have to go upon the stand, and, consequently the fact that they do not go upon the stand to contradict this statement to the minutes, they both denying through their counsel and through their plea, that they exhibited the paper, I do not see that that can be taken as at all prejudicial to either of them. They simply have the right to go upon the stand and they have not availed themselves of it, and it may be that there is no necessity for them to go there.
>
> "I leave that entirely to you."

And further:

> "Now, gentlemen, if you believe that that is so; if you believe this testimony that Cornell did direct this man's attention to it—Cornell

has sat here and heard that testimony and not denied it—nobody could misunderstand the import of that testimony, it was a direct accusation made against him of his guilt—if you believe that testimony beyond a reasonable doubt, Cornell is guilty. (And yet he has sat here and not gone upon the stand to deny it. He was not called upon to go upon the stand and deny it but he did not go upon the stand and deny it and it is for you to take that into consideration.)

"Now, Twining has also sat here and heard this testimony, but you will observe that there is this distinction as to the conduct of these two men in this respect: The accusation against Cornell was specific by Vreedenberg. It is rather inferential, if at all, against Twining, and he might say—it is for you to say whether he might say, 'Well I don't think the accusation against me is made with such a degree of certainty as to require me to deny it, and I shall not; nobody will think it strange if I do not go upon the stand to deny it because Vreedenberg is uncertain as to whether I was there; he won't swear that I was there.' So, consequently the fact that Twining did not go upon the stand can have no significance at all.

"(You must say that the fact that Cornell did not go upon the stand has no significance. You may say so, because the circumstances may be such that there should be no inference drawn of guilt or anything of that kind from the fact that he did not go upon the stand. Because a man does not go upon the stand you are not necessarily justified in drawing an inference of guilt. But you have a right to consider the fact that he does not go upon the stand where a direct accusation is made against him.)"

Whereas by said charge and by said judgment of the Court of Errors and Appeals in the Last Resort in all Causes of the State of New Jersey, the

said Albert C. Twining and David C. Cornell were deprived of the fundamental right and immunity not to be compelled to testify or to be witnesses against themselves or called on in the presence of the trial jury to testify or be witnesses against themselves, or to furnish or to be called on in the presence of said jury to furnish testimony or evidence against themselves, or to be witnesses against themselves in the trial of a prosecution like this involving their liberty and property; and the Fourteenth Amendment of the Constitution of the United States was violated in that thereby the said Albert C. Twining and David C. Cornell were deprived of their liberty and property, without due process of law guaranteed by said Amendment of the Constitution.

6. The Court erred in holding that there was no error prejudicial to the said Albert C. Twining and David C. Cornell, plaintiffs in error, or either of them, committed by the Monmouth County Court of Quarter Sessions of the State of New Jersey in the trial of said indictment, or in the judgment of the Supreme Court of New Jersey, affirming the same by reason of the fact that in charging the jury in the trial of said cause the trial judge charged in addition to and in intimate connection with the language of the charge heretofore quoted in the foregoing Assignments of Errors, as follows, so much of the charge as had been set forth in the previous assignments of error being reproduced in brackets:

> "Now, Twining and Cornell, this paper says were present. They are here in court and have seen this paper offered in evidence and they know that this paper says that they were the two men, or two of the men, who were present. Neither of them has gone upon the stand to

deny that they were present, or to show that the meeting was held.

"Now, it is not necessary for these men to prove their innocence. It is not necessary for them to prove that this meeting was held. (But the fact that they stay off the stand, having heard testimony which might be prejudicial to them, without availing themselves of the right to go upon the stand and to contradict it, is sometimes a matter of significance.)"

"Now, of course in this action, I do not see how that can have much weight, because these men deny that they exhibited the paper, and if one of these men exhibited the paper and the other did not, I do not see how you could say that the person who claims he did not exhibit the paper would be under any obligation at all to go upon the stand. Neither is under any obligation. It is simply a right they have to go upon the stand, and, consequently the fact that they do not go upon the stand to contradict this statement in the minutes, they both denying through their counsel and through their plea, that they exhibited the paper, I do not see that that can be taken as at all prejudicial to either of them. They simply have the right to go upon the stand and they have not availed themselves of it, and it may be that there is no necessity for them to go there.

"I leave that entirely to you."

And further:

"Now, gentlemen, if you believe that that is so; if you believe this testimony that Cornell did direct this man's attention to it—Cornell has sat here and heard that testimony and not denied it—nobody could misunderstand the import of that testimony, it was a direct accusation made against him of his guilt—if you believe that testimony beyond a reasonable doubt, Cornell is guilty. (And yet he has sat here and not gone upon the stand to deny it. He was not called upon to go upon the stand and deny it but he did not go upon the stand

and deny it and it is for you to take that into consideration.)

"Now, Twining has also sat here and heard this testimony, but you will observe that there is this distinction as to the conduct of these two men in this respect: The accusation against Cornell was specific by Vreedenberg. It is rather inferential, if at all, against Twining, and he might say—it is for you to say whether he might say, 'Well, I don't think the accusation against me is made with such a degree of certainty as to require me to deny it, and I shall not; nobody will think it strange if I do not go upon the stand to deny it because Vreedenberg is uncertain as to whether I was there; he won't swear that I was there.' So, consequently the fact that Twining did not go upon the stand can have no significance at all.

"(You must say that the fact that Cornell did not go upon the stand has no significance. You may say so, because the circumstances may be such that there should be no inference drawn of guilt or anything of that kind from the fact that he did not go upon the stand. Because a man does not go upon the stand you are not necessarily justified in drawing an inference of guilt. But you have a right to consider the fact that he does not go upon the stand where a direct accusation is made against him.)"

Whereas by the said charge, and by said judgment of the Court of Errors and Appeals in the Last Resort in all Causes of the State of New Jersey, the said Albert C. Twining and David [illegible] Cornell were deprived of the fundamental right and immunity not to be compelled to testify or be witnesses against themselves or called on in the presence of the trial jury to testify or be witnesses against themselves, or to furnish or to be called on in the presence of said jury to furnish testimony or evidence against themselves in the trial of a

prosecution like this involving their liberty and property, and the Fourteenth Amendment of the Constitution of the United States was violated in that thereby the said Albert C. Twining and David C. Cornell were denied the equal protection of the laws guaranteed by said amendment of the Constitution.

Wherefore the said Albert C. Twining and David C. Cornell state and claim that the due process of law was not observed in their trial and conviction, and that the equal protection of the laws was denied them, and their privileges and immunities as citizens of the United States and of the State of New Jersey were disregarded, abridged and violated on their trial, and that their conviction and all the steps leading up to the same, including the judgment of the Court of Errors and Appeals in the Last Resort in all Causes of the State of New Jersey are null and void because they are, and were, in violation of the aforesaid provisions of the Constitution of the United States, and they pray that the same may be reversed, annulled and altogether held for naught, and that the said Albert C. Twining and David C. Cornell may be restored to all things which they have lost because of the same.

See Record, pages 149-157.

## ARGUMENT.

### POINT I.

### A Federal question is presented by the record in this case, reviewable by this Court.

To the charge of the Court, set forth in the foregoing assignments of error, counsel duly excepted (see Record, p. 103).

Under sections 140-142, the Criminal Procedure Act of New Jersey (Pamph. L. 1898, p. 916) permits of a general exception to the charge without specification at the time, of the grounds of the exception or of the portions of the charge excepted to. These may be stated later.

In the assignments of error from the Supreme Court to the Court of Errors and Appeals, the following assignment appears (Record, p. 138):

> "(55.) That the Monmouth Quarter Sessions, in charging the jury in the trial of this cause as follows:
>
> 'But the fact that they (referring to the defendants) stayed off the stand, having heard testimony which might be prejudicial to them, without availing themselves of the right to go upon the stand and contradict it, is sometimes a matter of significance.'"

And further:

> "They simply had the right to go upon the stand, and they have not availed themselves of it, and it may be that there is no necessity for them to go there. I leave that question to you."

And further:

> "And yet he (meaning David C. Cornell, one of the defendants) has sat here and not gone upon the stand to deny it; he was not called upon to go upon the stand and deny it, but he did not go upon the stand and deny it; and it is for you to take that into consideration."

And further:

> "You must say that the fact that Cornell did not go upon the stand has no significance; you may say so because their circumstances may be such that there should be no inference drawn of guilt, or anything of that kind, from the fact that he did not go upon the stand; because a man does not go upon the stand you are not necessarily justified in drawing an inference of guilt, but you have a right to consider the fact that he does not go upon the stand where a direct accusation is made against him—
>
> "Violated Article 14th of the Constitution of the United States; and the Supreme Court violated said Article 14th in holding that there was no error committed by the Monmouth Quarter Sessions on the trial of the said indictment, in so charging the jury. And these defendants insist that thereby they have been deprived of their liberty without due process of the law, that thereby they have been denied equal protection of the laws in violation of said Article Fourteenth of the Constitution of the United States."

This assignment was passed upon and decided by the Court of Errors and Appeals adversely to the plaintiffs in error (see Opinion, Record, p. 144). *The sole ground therein stated for allowing comment on the failure of the plaintiffs in error to take the stand, was the absence of the restriction in the qualifying statute.*

The failure of the State Court to treat the matter as a Federal question does not deprive this Court of jurisdiction. It must have been acted upon to have enabled them to reach their conclusion and decided adversely to the plaintiffs in error. A State Court cannot deprive this Court of jurisdiction by evading the Federal question.

In *Schlemmer v. Buffalo R. & P. R. Co.*, 205 U. S., 11, the Court reiterated the rule, that it must appear affirmatively that the state court could not have reached its judgment without tacitly, if not expressly, deciding the Federal matter.

*Bachtel v. Wilson*, 204 U. S., 36.

If the question is duly raised and the judgment necessarily, or by what appears in fact involves such a decision, then this Court will take jurisdiction, although the opinion below says nothing about it.

*Kaukauna Water Power Co. v. Green Bay & M. Canal Co.*, 142 U. S., 254.

A State Court cannot, by resting its judgment upon some ground of local or general law, defeat the Appellate jurisdiction of the Supreme Court of the United States, if a Federal right or immunity was specially set up or claimed which, if recognized and enforced, would require a different judgment.

Chicago, Burlington & Quincy Rwy. Co. v. Illinois *ex rel.* Grimwood, 200 U. S., 561, 580.

The question here has been raised *at the proper time* and *in the proper manner.*

The Criminal Procedure Act above referred to, provides:

> "140. Upon the trial of any indictment it shall be lawful to take a general exception to the charge of the Court to the jury without specifying any particular ground or grounds for such exception, and without specifying what portions of said charge are excepted to, and it shall be the duty of the judge to settle a bill of such exception, and to sign and seal the same, to the end that the same may be returned with a writ of error to the Court having cognizance thereof.
>
> 141. It shall be lawful where such general exception has been taken to assign any error or errors of law upon any portion of the charge so excepted to.
>
> 142. If, upon the hearing of the cause upon a writ of error, it shall appear to the Court that any error of law has been committed in any part of the charge so excepted to, to the prejudice or injury of any defendant, in maintaining his defense, it shall be the duty of the court having cognizance thereof, to reverse the judgment.
>
> Section 136. The entire record had upon the trial of any criminal cause may be returned by the plaintiff in error therein with the writ of error, bringing up the bill of exceptions as signed and sealed in the cause; and on the argument such entire record shall be considered and adjudged by the Appellate Court, and if it appear from such record that the plaintiff in error on the trial below suffered manifest wrong or injury, either in the admission or rejection of testimony, whether objection was made thereto or not, or in the charge of the Court, or in the denial of any matter by the Court, which was a matter of discretion, whether a bill of exceptions was settled, signed and sealed thereto, or error assigned thereon,

or not, the Appellate Court shall remedy such wrong or injury and give judgment accordingly, and order a new trial; provided, no judgment given upon any indictment shall be reversed for any imperfection, omission, defect in, or lack of form, or for any error except such as shall or may have prejudiced the defendant in maintaining his defense upon the merits.

137. In all cases where the plaintiff in error shall elect to take up the entire record with his writ of error as herein provided, he shall specify the causes in the record relied upon for relief or reversal, and shall not be confined to his bill of exception, or required to assign error thereon. * * *"

General Statutes of New Jersey, p. 1154, Sec. 170, regulating the jurisdiction of the Court of Errors and Appeals, reads:

"The entire record of the proceedings had on the trial of any criminal cause may be returned and a new trial shall be ordered if it shall appear that the plaintiff in error has suffered manifest injury in the rejection of testimony, in the charge, in the discretionary denial of any matter or on the evidence."

This Section 136 has been held to have enlarged the jurisdiction of the court so that the entire record is brought up and may be reversed for error whether raised in the Court below or not.

*State v. Terry*, 61 Atl. Rep., 148, 150.

The relief permitted, when it appeared from the record of the trial that the plaintiff in error had suffered manifest wrong or injury in certain respects, is to be given "whether objection was made thereto or not," and "whether a bill of exceptions was settled, signed and sealed thereto and error assigned thereon or not." The plain purpose is to

permit a review by writ of error (1) for errors properly assigned upon the record or bills of exception; and (2) for matters appearing in the trial record disclosing that manifest wrong or injury had been done to plaintiff in error by the course taken at the trial in respect to certain specified matters.

State v. Lyons, 70 N. J. L., 638, 639;
State v. MacQueen, 69 N. J. L., 523;
State v. Zdanowicz, 69 N. J. L., 620.

The entire record was brought up in the case at bar.

See

Record, pp. 103-104, 130-138.

## POINT II.

**Comment by the Court upon the failure of the accused to testify was a violation of the fundamental rights of the plaintiff in error and was a denial of due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States.**

In each case the primary inquiry must be as to what is the system of law of the particular State, and whether, according to that law, as adjudged by its courts, the procedure in question is "due process;" and the secondary inquiry must be whether in that process of law if followed, there is any violation of the fundamental rights secured by the Federal Constitution.

*Guthrie's Fourteenth Amendment*, p. 72.

Citing

*Kennard vs. Louisiana*, 92 U. S., 480, 481;
*Caldwell vs. Texas*, 137 U. S., 692, 698;
*Leeper vs. Texas*, 139 U. S., 462, 469;
*McNulty vs. California*, 149 U. S., 645, 647.

When a statute, harmless on its face, is systematically enforced in violation of fundamental rights, the procedure is not due process of law, and may be declared void and set aside by the courts under the jurisdiction conferred by the Fourteenth Amendment.

Guthrie's Fourteenth Amendment, p. 73, and cases cited.

Article X of the Constitution of New Jersey reads:

> "The common law and statute laws now in "force not repugnant to this constitution, "shall remain in force until they expire by "their own limitation, or be altered or re- "pealed by the legislature."

The statute permitting the accused to testify (Criminal Procedure Act of 1898), section 57, reads:

> "Upon the trial of any indictment, the defendant shall be admitted to testify, if he shall offer himself as a witness."

This is a re-enactment of the 8th section of the old Evidence Act (P. L. 1871, p. 12).

The courts have uniformly coupled this subject with the common-law maxim. No person shall be compelled in any criminal case to be a witness against himself. While this provision is not contained in the Constitution of New Jersey, its Court of Errors and Appeals in State vs. Zdanowicz, July

20, 1903, 55 Atl. Rep. 744, by Ch. MAGIE, expressed itself as follows:

> "By the fifth amendment to the constitution of the United States it is, among other things, provided that no person shall be compelled in any criminal case to be a witness against himself. Many of the states have included a similar prohibition in their constitutions. There is no such prohibition in the Constitution of the State of New Jersey. It is not deemed necessary to consider whether this constitutional provision will operate to prevent any state—if it is conceivable that any state should desire to do so—from enacting laws establishing a practice in criminal cases such as is in vogue in countries not following the course of the common law, or permitting an accused person to be subject to such compulsion as may be exerted by harassing examination or other means, forcible or practically forcible, compelling him to testify against himself; or to prevent the adoption by any state of a practice which might produce that effect. *Although we have not deemed it necessary to insert in our Constitution this prohibitive provision, the common-law doctrine, unaltered by legislation or by lax practice, is by us deemed to have its full force. In New Jersey no person can be compelled to be a witness against himself.*"

The State of New Jersey stands out alone, among all the States and Territories of the Union in permitting comment upon the failure of the accused to testify and bases its action solely upon the absence of any restriction in the qualifying statute, holding that the accused is thus placed in the same position as any party to a civil suit.

> Parker vs. State, 61 N. J. L., 308;
> State vs. Wines, 65 N. J. L., 31;
> State vs. Banusik, 64 Atl. Rep., 994.

Even this State is divided in its decisions, holding in *Parker v. State, supra,* that when the evidence given on the part of the State, in the presence of the defendant, *directly* showed acts of his, in respect to which he had been given the privilege of testifying, it was not error to direct the attention of the jury to his failure to avail himself of the opportunity of contradicting such *direct* evidence. On the other hand, in *State v. Wines, supra,* it was held error when the evidence against him was only *circumstantial,* and therefore only raised *inferences* as to his acts.

See

*Opinion*, Record, pp. 144-145.

But who is to determine whether or not the evidence is direct or circumstantial? What attorney can properly advise his client under those conditions and what defendant can properly determine whether he is obliged to take the stand to avoid comment? In the case at bar it was left to the jury, and the comment had then been made, and the injury done.

See

*Charge*, pp. 99, 102.

The statutes on this subject may be grouped in three classes:

1st: Merely qualifying accused as a witness.
South Carolina, New Jersey and Georgia (accused permitted to make statement), California (1866-1874), and Virginia (till 1885).

2nd: Qualifying accused as witness and declaring his failure to testify shall create no presumption against him.
Alaska, Arizona, Arkansas, California, (after 1874), Colorado, District of Columbia, Idaho, Louisiana, Maine, Maryland, Massachu-

setts, Nevada, New Mexico, New York, North Carolina, Oregon, South Dakota, Tennessee, United States, Vermont, Washington and Wisconsin.

3rd: Going still further and forbidding comment by either counsel or court and in some states, by jury.

Alabama, Connecticut, Delaware, Florida, Hawaii, Illinois, Indiana, Iowa, Kansas, Kentucky, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, Texas, Utah, Virginia (after 1885), West Virginia and Wyoming.

It is well to consider in this connection the decisions of the States in the same class with New Jersey:

In *People v. Tyler*, 36 Cal., 522, the pioneer case on this subject, the Court said:

> "At the trial the defendant did not avail himself of the right conferred by this act to offer himself as a witness on his own behalf. During the argument of the case, the District Attorney called the attention of the jury to the fact that the defendant had not testified in his own behalf and argued and insisted before said jury that the silence of the defendant was a circumstance strongly indicative of the defendant's guilt. Defendant's counsel objected to this course of argument, and requested the Court to require the District Attorney to refrain from urging such inference, but the Court declined to interfere, and intimated that the law justified the counsel in the course pursued. Counsel thereupon continued to urge before the jury that the silence of the defendant was a circumstance tending strongly to prove his guilt, and the counsel for the prisoner excepted.
>
> "At the close of the argument of the case to the jury, the defendant's counsel asked the

Court to give to the jury the following instructions: 'The jury should not draw any inference to the prejudice of the defendant from the fact that he did not offer himself as a witness in his own behalf. It is optional with a defendant to do so or not, and the law does not intend that the jury should put any construction upon his silence unfavorable to him.' The Court refused to give the instruction and defendant excepted.

"Act under which the question arises, constitutes one of the advances recently made by our legislation in the law of evidence. * * *

"The policy of such a statute has been considerably discussed by law writers and others, and, to our minds, the strongest objection that has been urged against it, is, that it places a party charged with crime in an embarrassing position; that, even when innocent, a party upon trial upon a charge for some grave offense may not be in a fit state of mind to testify advantageously to the truth even, and yet if he should decline to go on the stand as a witness, the jury would, from this fact, inevitably draw an inference unfavorable to him, and thus he would be compelled, *against the humane spirit of the common law*, to furnish evidence against himself, negatively at least, by his silence, or take the risk, under the excitement incident to his position, of doing worse, by going upon the stand and giving positive testimony. The object of the statute is undoubtedly beneficent. It was designed to afford a party charged with crime and who must necessarily be cognizant of the true state of the case, an opportunity to controvert or explain any fact that may appear to be against him. It was designed to facilitate the attainment of truth, and to advance the ends of justice, by opening the door, under certain wise restrictions consistent with the humane policy of the law, not to compel a party to criminate himself, to all the avenues and sources of truth. * * *

"Upon an examination of the Act, we find that a person charged with an offense, 'shall, *at his own request, but not otherwise*, be deemed a competent witness.' It is optional with him, then whether he will testify or not; and section two provides that 'Nothing herein contained shall be construed as compelling any person to testify.' This is but a re-enactment by the statute of that provision of our State Constitution which says no person 'shall be compelled in any criminal case to be a witness against himself' (Art. I, Sec. 8).

"At the trial, by his plea of not guilty, the party charged denies the charge against him. This is itself a positive act of denial, and puts upon the People the burden of affirmatively proving the offense alleged against him. When he has once raised this issue by his plea of not guilty the law says he shall thenceforth be deemed innocent till he is proved to be guilty, and both the common law and the statute give him the benefit of any reasonable doubt arising on the evidence. Now, if, at the trial, when for all the purposes of the trial, the burden is on the People to prove the offense charged by affirmative evidence, and the defendant is entitled to rest upon his plea of not guilty, an inference of guilt could legally be drawn from his declining to go upon the stand as a witness, and again deny the charge against him in the form of testimony, he would practically, if not theoretically, by his act declining to exercise his privilege, furnish evidence of his guilt that might turn the scale and convict him. In this mode he would indirectly and practically *be deprived of the option which* the law gives him, and of the benefit of the provision of the law and the Constitution, which say, in substance, that he shall not be compelled to criminate himself. *If the inference in question could be legally drawn the very act of exercising his option as to going upon the stand as a witness, which he is nec-*

*essarily compelled by the adoption of the statute to exercise one way or the other, would be, at least to the extent of the weight given by the jury to the inference arising from his declining to testify, a crimination of himself.*

"Whatever the ordinary rule of evidence with reference to inferences to be drawn from the failure of parties to produce testimony that must be in their power to give, we are satisfied that the defendant, *with respect to exercising his privilege under the provision of the Act in question*, is entitled to rest in silence and security upon his plea of not guilty, and that no inference of guilt can be properly drawn against him from his declining to avail himself of the privilege conferred upon him to testify on his own behalf; that to permit such an inference would be to violate the principles and the spirit of the Constitution and the statute, and defeat rather than promote the object designed to be accomplished by the innovation in question."

In Virginia, by Sec. 19, Chap. 14, Act of Mar. 14, 1878, it was provided that "in all prosecutions for assault and battery and unlawful trespass, the accused may be sworn and examined as a witness in his own behalf." This was enlarged to cover prosecutions for shooting, stabbing, etc., with intent to kill, maim, &c., and shooting, stabbing, etc., in committing or attempting to commit a felony by Chap. 228, Laws of 1881-1882.

While the statute was in this condition and similar to the statute in New Jersey, the Court in

Price vs. Commonwealth, 77 Va. (Ct. of App.), 393, (1883),

held, the object of a statute was to afford him opportunity to testify or not as his interest might dictate, and not to deprive him of his right to deny his guilt by plea and rest upon the legal presump-

tion of innocence, and that it can never be made a means for depriving the prisoner of this presumption of innocence as it inevitably will if the Courts and their officers are permitted to comment upon the failure of the accused to testify.

This was followed by an extension of rule to all cases of felony or misdemeanor and adding "his failure to testify shall create no presumption against him, nor be the subject of any comment before the court or jury by the prosecuting attorney."

> See Chap. 39 Laws 1885-1886, subsequently incorporated in the Code of 1887, Sec. 3897.

In State vs. Howard, 35 S. C., 202, District Attorney addressed the jury:

> "The counsel for William L. Howard have argued that he did not make the confession. Now, gentlemen, if he did not make the confession, why did he not go upon the stand and deny it? He is at present in court and could have done so."

The Court said:

> "This is the first instance where this court has been called upon to decide this delicate question. As we understand the present inquiry, it will require us to compare the constitutional right, so to speak, of a defendant in a criminal prosecution, with that provision in the General Statutes of this State touching his right to testify. Article I, section 13, of the State Constitution provides: 'No person shall be compelled to accuse or furnish evidence against himself.' Section 2643 of the General Statutes of this State reads: 'In the trial of all criminal cases the defendant shall be allowed to testify (if he desires to do so, and not otherwise) as to the facts and circumstances of the case.' To our minds, these two provisions, one of our constitution and the

other of our statute law, look to an absolute freedom of defendants, in all criminal cases, as to testifying; the former indicates that such an one shall not be forced to testify, while the latter is purely permissive, provided he chooses to do so. This being the case it almost of necessity follows that nothing shall result to his prejudice from a failure to testify.

We cannot regard the utterances of the solicitor in his argument otherwise than as trenching upon these provisions of the law that the prisoner lawfully invokes for his protection."

In Bird vs. Georgia, 50 Georgia, 585, 589, the Court said:

"The defendant did not make any statement to the jury on the trial, as by law he was permitted to do. The Court charged the jury that 'They might take into consideration the fact that defendant failed to make a statement, and to give to that such weight as they might see fit with the other evidence, and if, upon the whole, they should believe him guilty, they should so find; otherwise not.' Was this charge correct? Does it not directly imply that the failure of defendant to make a statement, is, in law, some evidence against him, and that the failure may be considered by the jury, *with the other evidence*, to determine his guilt? We do not think that the statute giving this right to a defendant intended that it should be counted against him, if he did not avail himself of it. If so, it should be stricken from the statute book at once. Really, in practice it is worth, generally, but little if anything to defendants. I have never known or heard of but one instance where it was supposed that the right had availed anything. It is a boon that brings not much relief. It would be terrible if what a defendant said in his behalf could not practically count much for him, certainly not as other evidence—and yet a failure to say something should count as evidence

> against him, to be considered by the jury with 'the other evidence.' If this be so, the statute is a sword to pierce, where it was intended, whether wisely or not, as something of a shield."

The statutes of the several states and their decisions thereon, are collated in *Wigmore on Evidence*, Vol. III., Sec. 2272, n. 2, and Vol. I, Sec. 488.

In this court, its views have already been expressed by Mr. JUSTICE FIELD in *Wilson v. U. S.*, 149 U. S., 60, as follows:

> "The act of Congress permitting the defendant in a criminal action to appear as a witness in his own behalf upon his request declares, as it will be seen that his failure to request to be a witness in the case *shall not create any presumption against him.*
>
> To prevent such presumption being created, comment, especially hostile comment, upon such failure must necessarily be excluded from the jury. *The minds of the jurors can only remain unaffected from this circumstance by excluding all reference to it.*
>
> At common law no one accused of crime could be compelled to give evidence in a prosecution against himself, nor was he permitted to testify in his own behalf. The accused might rely upon the presumption of the law that he was innocent of the charge, and leave the government to establish his guilt in the best way he could.
>
> This rule, while affording great protection to the accused against unfounded accusation, in many cases deprived him from explaining circumstances tending to create conclusions of his guilt which he could readily have removed if permitted to testify. To relieve him from this embarrassment the law was passed. In mercy to him, he is by the act in question permitted upon his request to testify in his own behalf in the case. In a vast number of instances the innocence of the defendant of the

charge with which he was confronted has been established.

But the Act was framed with a due regard also to those who might prefer to rely upon the presumption of innocence which the law gives to everyone, and not wish to be witnesses. It is not everyone who can safely venture on the witness stand though entirely innocent of the charge against him. Excessive timidity, nervousness when facing others and attempting to explain transactions of a suspicious character, and offenses charged against him, will often confuse and embarrass him to such a degree as to increase rather than remove prejudices against him. It is not everyone, however honest, who would therefore willingly be placed on the witness stand. The statute, in tenderness to the weakness of those who from the causes mentioned might refuse to ask to be a witness, particularly when they may have been in some degree compromised by their association with others, declares that the failure of the defendant, in a criminal action to request to be a witness shall not create any presumption against him.

* * * * * *

The refusal of the court to condemn the reference of the district attorney and to prohibit any subsequent reference to the failure of the defendant to appear as a witness tended to his prejudice before the jury, and this effect should be corrected by setting the verdict aside and awarding a new trial.

Similar statutes to the one we have been considering have been passed by several states, and the rulings upon them have been substantially in accordance with our judgment in this case.

In 1866 the legislature of Massachusetts passed an act almost identical in terms with the Act of Congress under consideration. It provided that 'in the trial of all indictments, complaints, and other proceedings against persons charged with the commission of crimes

or offenses the person so charged shall, at his own request, and not otherwise, be deemed a competent witness, nor shall the neglect or refusal to testify create any presumption against the defendant.' The provision has been since re-enacted in substantially the same terms. Mass. Stat. 1866, chap. 260; 1870, chap. 393, Sec. 1, cl. 3; Pub. Stat. chap. 169, Sec. 18, cl. 3. And in the case of Com. v. Scott, 123 Mass., 239. The Chief Justice, in delivering the opinion of the court, after referring to the fact that the government had no right to interrogate a person accused of crime, or compel him to testify, but was bound to sustain its charge by independent evidence, observed that 'the statutes allowing persons charged with the commission of crimes or offenses to testify in their own behalf were passed for their benefit and protection, and clearly recognize their constitutional privilege, by providing that their neglect or refusal to testify shall not create any presumption against them.'

And again: 'The course of the closing argument for the prosecution tended to persuade the jury that the omission of the defendants to testify implied an admission or consciousness of the crime charged; and the presiding judge in permitting such a course of argument, against the objection of the defendants, and in ruling that the prosecuting attorney had a right to comment on the reasons which the defendants' counsel gave for their not going upon the stand and testifying in their behalf, and also to give the reasons which the government contended really existed for their not testifying, committed an error which was manifestly prejudicial to the defendants, and which obliges this court to set aside the verdict and order a new trial.'

The criminal code of Illinois, after providing that in criminal cases the accused may, on his own motion, testify in the case, declares, in a proviso, that 'his neglect to testify shall not create any presumption against him, nor shall

the court permit any reference or comment to be made to or upon such neglect.'

In the case of *Austin v. People*, 102 Ill., 261, 264, a reference had been made to the neglect of the accused to testify, both in the opening and concluding argument for the prosecution, and the court in setting aside the verdict of guilty which was rendered in that case said: 'When the statute says that no presumption against the accused shall be created by his neglect to testify, it clearly meant that in cases where the defendant should not choose to avail himself of the privilege offered by the statute, the trial should be conducted in the same manner and upon the same presumptions as if the statute had not been passed.' And again: 'We do not see how this statute can be completely enforced, unless it be adopted as a rule of practice that such improper and forbidden reference by counsel for the prosecution shall be regarded as good ground for a new trial in all cases where the proofs of guilt are not so clear and conclusive that the court can say affirmatively the accused could not have been harmed from that cause.'"

In *McKnight v. U. S.*, 115 Fed. Rep., 982, 983, the Court says:

"The reference to the right of the defendant to testify where he does not see fit to avail himself of the privilege puts him in a position where the jury will draw inferences against him from his silence, and the statute which was intended as a shield for protection will be turned into a weapon of attack in establishing his guilt." * * *

"* * * After allusion has once been made to the right of the defendant to testify, the accused is virtually driven upon the stand, or remains off at the peril of having inferences drawn against him from his silence, when the law gives him the right to speak."

The same regard for the rights of the accused is shown throughout the Union, holding comment upon his failure to testify to be a violation of his fundamental right to remain silent, existing long prior to the adoption of the several constitutions and as early as the beginning of the 17th century.

In Cooper v. State, 86 Ala., 610, the Court said:

> "The constitution, Art. I, Sec. 7, declares that the accused 'shall not be compelled to give evidence against himself.' The principle of this clause is common to the constitutions of this country. It doubtless had its birth in the abhorrence with which confessions, coerced by inquisitorial torture, were regarded alike in England and America. Courts have differed very widely in its interpretation. Perhaps, its most learned and exhaustive discussion will be found in the able opinion of Mr. Justice Bradley in Boyd v. U. S., 116 U. S., 616."

Here the defendant refused to make tracks to be compared with the burglars, and the Court allowed comment upon the refusal; held error and judgment reversed.

In *People v. Cuff*, 122 Cal., 589, an instruction was held erroneous, where the Court stated to the jury "that if weaker and less satisfactory evidence is offered, when it appears that stronger and more satisfactory was within the power of the party, the evidence offered should be viewed with distrust." The defendant did not take the stand, and the only purpose to be inferred in giving the instruction was to comment upon such failure.

Held, that the defendant had a constitutional right to stand mute and demand that the prosecution prove a case against him beyond a reasonable doubt.

It is elementary law that the defendant is not required to take the witness stand, and that no pre-

sumption can be indulged against him by reason of his failure to testify in the case.

People v. Brown, 53 Cal., 66;
People v. Streuber, 121 Cal., 43.

In *Petite v. The People*, 8 Colo., 518, the Court said:

> "Too much care, however, cannot be exercised by courts in giving effect to the latter part of the provisions above quoted (refusal to testify shall not be taken as evidence of guilt). Otherwise, as suggested by an eminent writer, 'there will be a practical abrogation of the great constitutional and juridical principle that no man is to be compelled to criminate himself.' For if silence is to be taken as evidence of guilt, defendant's option is of but little avail; he is practically forced to testify, and once upon the stand may be required to give the very testimony upon which his conviction shall rest."

See,

*Wharton's Crim. Ev.*, 9th Ed., Sec. 435.

In *Quinn v. People*, 123 Ill., at page 345, the Court said:

> "It is claimed by the prisoner, that in the conduct of the trial, his rights, under the constitution and laws of the State, were violated and disregarded. It is clear that whenever a trial is so conducted as to deprive the accused of any substantial right, he has not had a fair trial, within the meaning of the constitution, and a trial which is not fair is not only violative of common right, but is contrary to the spirit and genius of our free institutions. It is also a reproach to the courts that permit it, and a blot upon the jurisprudence of the State."

See

Baker v. People, 105 Ill., 452;

Austin v. People, 102 Ill., 261;
Angelo v. People, 96 *id.*, 209;
Miller v. People, 216 Ill., 309.

In Maine for fifteen years the courts permitted comment upon the failure of the accused to testify, but the Legislature in 1879, feeling that the constitutional rights of the defendant were not thereby sufficiently protected, enacted that the fact that the defendant in a criminal prosecution does not testify in his own behalf shall not be evidence of his guilt, thus overruling the law expressed by the Courts, in State vs. Bartlett, 55 Maine, 220; State vs. Lawrence, 57 Maine, 574; State vs. Cleaves, 59 Me., 298.

The amendment came before the Court in State vs. Banks, 78 Me., 492, where VIRGIN, J., said:

> "The legislature, believing that the constitutional provision which declares that 'the accused shall not be compelled to furnish or give evidence against himself' (Decl. Rights, sec. 5), like the rain descended upon the innocent and guilty alike, and looking to a more careful protection of this right, enacted that the fact that the defendant in a criminal prosecution does not testify in his own behalf, shall not be evidence of his guilt."
>
> St. 1879, ch. 92, sec. 6; R. S. ch. 134, sec. 19.

Wigmore in his Work on Evidence at page 3145, sec. 2272, commenting upon the fallacies of the rule as laid down by P. Justice APPLETON in State vs. Cleaves, *supra*, said:

> "The bare inference is indeed inevitable, but it is at least a practical question whether counsel's comment shall be permitted.
>
> "By hypothesis, his answer will be criminating (and it is the ignoring of this hypothesis

which seems to form the fallacy of the learned Chief Justice Appleton); thus, the supposed option lies between answering in confession of the criminating fact or keeping silence and letting the same fact be inferred; which is no option at all.

"It is true that no reply is required and that this is the strongest argument for maintaining that the privilege is not violated. But if we consider the ultimate ground of policy upon which the privilege rests, we observe that a general practice of permitting the use of such inferences would (as against accused persons, at least) tend to bring about the very evils which the privilege is intended to prevent, namely, the reliance by the prosecution, for the means of proof, upon the confessions in court of the accused himself or upon the inferences of guilt which could be drawn from his silence, and the consequent slack and imperfect investigation of other sources of proof."

*A careful reading of the proof adduced against the plaintiff in error convinces one that this is precisely what was done in the case at bar.*

These earlier decisions in Maine are palpable attempts to evade the constitutional privilege itself.

In *Wynehamer v. The People*, 13 N. Y., 444-447, SELDEN, J., said, the legislature "cannot subvert that fundamental rule of justice which holds that every man shall be presumed innocent until he is proved guilty. This rule will be found specifically incorporated into many of our State Constitutions, and is one of those rules which, in our Constitution, are compressed into the brief but significant phrase 'due process of law.'" * * * All those fundamental rules of evidence, which in England and in this country have been generally deemed essential to the due administration of justice, and which have been acted upon and enforced by every court of common law for centuries, are placed by

the Constitution beyond the reach of legislation. They are but the rules which reason applies to the investigation of truth, and are of course, in their nature unchangeable. If it does not follow that to determine what they are, as applicable to judicial proceedings, is a judicial and not a legislative power, still they must necessarily be included in the phrase, "due process of law." If this be not the true interpretation of the Constitution; if the Legislature, in addition to declaring what acts and what intentions shall be criminal, can also dictate to courts and juries the evidence, and change the legal presumptions upon which they shall convict or acquit, there is no barrier to legislative despotism and the separation of the legislative and judicial departments of the government, the guarantee of trial by jury, and of a trial according to the course of the common law, have all failed to afford any substantial security to individual rights.

In *Ruloff v. The People*, 45 N. Y., 213-225, the Court said, at pages 221-222:

> "By statute (ch. 678 of the Laws of 1869) persons upon trial for crime may, at their own request, but not otherwise, be deemed competent witnesses. The act may be regarded as of doubtful propriety, and many regard it as unwise, and as subjecting a person on trial to a severe if not cruel test. If sworn, his testimony will be treated as of but little value, will be subjected to those tests which detract from the weight of evidence given under peculiar inducements to pervert the truth when the truth would be unfavorable, and he will, under the law as now understood and interpreted, be subjected to the cross-examination of the prosecuting officer, and made to testify to any and all matters relevant to the issue, or his own credibility and character, and under pretence of impeaching him as a witness, all the incidents of his life brought to bear with great

force against him. He will be examined under the embarrassments incident to his position, depriving him of his self-possession and necessarily greatly interfering with his capacity to do himself and the truth justice, if he is really desirous to speak the truth. These embarrassments will more seriously affect the innocent than the guilty and hardened in crime. Discreet counsel will hesitate before advising a client charged with high crimes to be a witness for himself, under all the disadvantages surrounding him. If, with this statute in force, the fact that he is not sworn can be used against him, and suspicion be made to assume the form and have the force of evidence, and circumstances, however slightly tending to prove guilt, be made conclusive evidence of the fact, then the individual is morally coerced, although not actually compelled to be a witness against himself. *The constitution, which protects a party accused of crime from being a witness against himself, will be practically abrogated.* * * *

"An allusion by the judge to the fact, unexplained, cannot but be prejudicial to a person on trial, and a provision intended for his benefit will prove a trap and a snare."

In *People v. Courtney*, 94 N. Y., 492, the Court said:

"A law which, while permitting a person accused of crime to be a witness in his own behalf, should at the same time authorize a presumption of guilt from his omission to testify, would be a law adjudging guilt without evidence, and while it might not be obnoxious to the constitutional provision against compelling a party in a criminal case to be a witness against himself, would be a law reversing the presumption of innocence, and would violate fundamental principles, binding alike upon the legislature and the courts."

In Rhode Island (*State v. Hall*, 18 R. I., 211), the Court said:

> "It was the defendant's privilege as well as right, not only to remain silent herself, but also not to offer any testimony in her defence, but to rely upon the presumption of innocence which obtained in her favor, and the insufficiency of the evidence produced by the State, to convict her. In other words, the State was bound to prove her guilty, without any assistance, either active or passive, on her part."

In *State v. Beswick*, 13 R. I., 211, the Court held that the common law maxim, that every person is to be presumed innocent until he is proved guilty, is recognized in the Constitution as a fundamental principle of jurisprudence.

In South Dakota (*State v. Williams*, 75 N. W., 815), the Court said:

> "This law, while intending to confer a benefit upon the accused, places him in a peculiar position. If he does make the request and takes the stand, his testimony will be subject to those tests on cross-examination that may prove embarrassing, and detract largely from its weight as evidence. If, on the other hand, his failure to take the stand in his own behalf can be ever called to the attention of the jury, the provision intended for his benefit would prove a trap and a snare."

In Vermont, as early as 1868, in *State v. Cameron*, 40 Vt., 555, the Court said:

> "By the express terms of the statute as well as the fair interpretation of the constitution it is forbidden. The respondent's omission to testify, not only by law, creates no presumption against him, but it permits no such presumption in fact. The statute permitting a prisoner to testify for himself is a mere statute of privilege. The courts in this State not having

usually followed the old English practice of calling upon the prisoner to make his statement to the jury, and there being a certain class of cases in which a prisoner might be benefited by testifying, the statute has awarded him this privilege with a view to its being used in such exceptional cases. In the great body of cases no wise practitioner would permit his client whether he believed him guilty or innocent, to testify when upon trial on a criminal charge. The very fact that he testifies as if with a halter about his neck, that he is under such inducement to make a fair story for himself, his character and his liberty if not his fortune and his life being at stake, is enough to usually deprive his testimony of all weight in his favor, whether it be true or false."

"It may be said that the general scope of the provision requiring due process of law is to secure to every person, whether citizen or alien, those fundamental and inalienable rights of life, liberty and property which are inherent in every man, and to protect all against the arbitrary exercise of governmental powers in violation and disregard of established principles of distributive justice. This protection is the object and the essence of free government, and without it true liberty cannot exist."

*Guthries' 14th Amendment*, p. 67.

How iniquitous is the rule as laid down in New Jersey and how violative of the defendant's fundamental rights, it may become, is forcibly shown in the case at bar.

Under the Evidence Act of New Jersey (Pamph. L. 1900, p. 362, Sec. 1), a defendant, taking the stand as a witness in his own behalf, may have his credibility attacked and his testimony impeached by proof of a former conviction.

"No person offered as a witness in any action or proceeding of a civil or criminal nature

shall be excluded by reason of his having been convicted of crime, but such conviction may be shown on the cross-examination of the witness, or by the production of the record thereof, for the purpose of affecting his credit."

State vs. Henson, 33 Vr., 601.
Sttae vs. Fox, 41 Vr., 353.
State vs. Mount, 43 Vr., 365.

In the case at bar at the time of trial (March 1, 1904) the defendant (plaintiff in error here) had previous been *erroneously* convicted on January 22, 1904 (see Twining vs. U. S., 141 Fed. Rep., 41), where the conviction was subsequently reversed, on December 11, 1905.

The defendant was, therefore, forced to take either one or the other horn of the dilemma. Remain silent and have his silence taken as a presumption of guilt. Take the stand and be forced to strengthen the weak record already adduced by the prosecution by the fact that he was then an adjudged criminal.

## POINT III.

**Comment by the Court upon the failure of the accused to testify was a denial to the plaintiff in error of his privilege and immunity as a citizen of the United States guaranteed by the Fourteenth Amendment in that he was thus compelled to be a witness against himself in violation of the Fifth Amendment.**

We have seen from the cases already reviewed that this subject is inseparably linked with the constitutional provision that

> "No person * * * shall be compelled in any criminal case to be a witness against himself. * * *"

See

U. S. Constitution, Fifth Amendment.

Whether or not the Fourteenth Amendment has extended the application of this cardinal principle to the several States is still an open question undecided by this Court.

This Court has said that the construction of these provisions must be "a gradual process of judicial inclusion and exclusion" as time goes on.

Davidson v. New Orleans, 96 U. S., 104.

As was said by Mr. Justice Bradley, in the Slaughterhouse Cases, 16 Wall., 36, the determination of just what privileges and immunities of citizens of the United States the States cannot abridge must wait until cases involving those privileges are properly presented to the Court.

Article V of the Amendments, *alone relied on*, does not operate as a "restriction of the powers of a State, but was intended to operate solely upon the Federal Government."

Barrington v. Missouri, 205 U. S., 486.

This plainly indicates that where a *fundamental* right guaranteed by the earlier amendments is involved then this Court has jurisdiction because of the guarantee in the 14th amendment that no State shall abridge those privileges or immunities or deny due process of law.

This question has been twice brought to the attention of this Court and is still open and undecided.

In Consolidated Rendering Co. v. Vermont, 207 U. S., 553 (decided Jan. 6, 1908), the Court said: "The objection that the notice authorized by the statute amounted to an unreasonable search and seizure of the private books and documents of the company is also not well founded. In Adams v. New York, 192 U. S., 585, where the question was raised, the Court refused to discuss the contention that the Fourteenth Amendment made the provisions of the Fourth and Fifth Amendments to the Constitution of the United States, so far as they related to the right of the people to be secure against unreasonable searches and seizures, *and to be protected against being compelled to testify in a criminal case against themselves*, privileges and immunities of citizens of the United States of which they could not be deprived by the action of the State, because on an examination of the record the Court concluded that there had been no violation of this restriction, either in the unreasonable search and seizure or in compelling plaintiff in error to testify against himself. We are of opinion that there was

no violation of such rights in the case before us, and we think it equally unnecessary to decide the question which was left undecided in the Adams case."

The power of the States to abridge these great rights of citizens can never be conceded until the Court shall expressly so decide in a case involving the exact question and adequately argued.

Guthrie's 14th Amendment, p. 62.

In determining whether or not this privilege is a fundamental right, the history of the provision is significant.

In Bram v. U. S., 168 U. S., p. 543 *et seq.*, the Court quoting at length from Brown v. Walker, 161 U. S., 596, said:

> "The maxim *Nemo tenetur seipsum accusare* had its origin in a protest against the inquisitorial and manifestly unjust methods of interrogating accused persons, which has long obtained in the continental system, and until the expulsion of the Stuarts from the British throne in 1688, and the erection of additional barriers for the protection of the people against the exercise of arbitrary power, was not uncommon even in England. While the admissions or confessions of the prisoner, when voluntarily and freely made, have always ranked high in the scale of incriminating evidence, if an accused person be asked to explain his apparent connection with a crime under investigation, the ease with which the questions put to him may assume an inquisitorial character, the temptation to press the witness unduly, to browbeat him if he be timid or reluctant, to push him into a corner, and to entrap him into fatal contradictions, which is so painfully evident in many of the earlier state trials, notably in those of Sir Nicholas Throckmorton and Udal, the Puritan minister, made the sys-

tem so odious as to give rise to a demand for its total abolition. The change in the English criminal procedure in that particular seems to be founded upon no statute and no judicial opinion, but upon a general and silent acquiescence of the courts in a popular demand. But, however adopted, it has become firmly imbedded in English as well as in American jurisprudence. So deeply did the iniquities of the ancient system impress themselves upon the minds of the American colonists that the States, with one accord, made a denial of the right to question an accused person a part of their fundamental law, so that a maxim which in England was a mere rule of evidence, became clothed in this country with the impregnability of a constitutional enactment.

There can be no doubt that long prior to our independence the doctrine that one accused of crime could not be compelled to testify against himself had reached its full development in the common law, was there considered as resting on the law of nature, and was imbedded in that system as one of its great and distinguishing attributes.

In Burrows v. High Commission Court (1616) Bulst., 49, Lord Coke makes reference to two decisions of the courts of common law as early as the reign of Queen Elizabeth, wherein it was decided that the right of a party not to be compelled to accuse himself could not be violated by the ecclesiastical courts. Whatever, after that date, may have been the departure in practice from this principle of the common law (Taylor, Ev., Section 886), certain it is that without a statute so commanding, in Felton's case (1628), 3 How. St. Tr., 371, the Judges unanimously resolved, on the question being submitted to them by the King, that 'no such punishment as torture by the rack was known or allowed by our law.'"

Down to the Civil Wars of England, the interrogation of the prisoner on his arraignment formed the most important part of the trial. Under the

Stuarts questions were still asked of the prisoner, though the extreme unpopularity of the ex-officio oath and of the Star Chamber procedure founded upon it, had led to the assertion that the maxim, "*Nemo tenetur accusare seipsum*," was part of the law of God and of nature (to use the language of the day), an assertion which was all the more popular because it condemned the practice of torture for purposes of evidence, then in full use both on the Continent and in Scotland.

Soon after the revolution of 1688, the practice of questioning the prisoner died out, and as the rules of evidence passed from the civil to the criminal courts, the rule that a party was incompetent as a witness which prevailed in civil cases in England till 1853 was held to apply to criminal cases.

> Stephen's History of the Criminal Law of England, Vol. 1, p. 440.

Story on the Constitution, 5th Ed., 1782 and 1788, says:

> "This is but an affirmance of a common law privilege. But it is of inestimable value. It is well known that in some countries not only are criminals compelled to give evidence against themselves but are subjected to the rack of torture in order to procure a confession of guilt. And, what is worse, it has been (as if in mocking or scorn) attempted to excuse or justify it, upon the score of mercy and humanity to the accused. It has been contrived, it is pretended, that innocence should manifest itself by a stout resistance, or guilt by plain confession; as if a man's innocence were to be tried by the hardiness of his constitution, and his guilt by the sensibility of his nerves. Cicero, many ages ago, though he lived in a state wherein it was usual to put

> slaves to the torture in order to furnish evidence, has denounced the absurdity and wickedness of the measure in terms of glowing eloquence, as striking as they are brief (see 4 *Black Comm.*, 326). They are conceived in the spirit of Tacitus and breathe all his pregnant and indignant sarcasm. Ulpian, also at a still later period in Roman jurisprudence, stamped the practice with severe reproof" (*1 Gilb., Hist.*, 249).

In all the States the accused is entitled to a speedy and public trial by an impartial tribunal; to have the presence, advice and assistance of counsel in his defense; to be confronted with the witnesses against him; and is not to be compelled to give evidence against himself. * * * However much the forms of proceeding or the nature of the tribunal may be changed, due process of law must necessarily include each and all of these requisites.

*2 Story's Commentaries on the Constitution*, p. 697 (5th Ed.).

The humanity of our law always presumes an accused party innocent until he is proved to be guilty. This is a presumption which attends all the proceedings against him, from their initiation until they result in a verdict, which either finds the party guilty or converts the presumption of innocence into an adjudged fact.

*Cooley's Const. Lim.*, 6th Ed., p. 375.

> "A far more important requirement is that the proceeding to establish guilt shall not be inquisitorial. A peculiar excellence of the common-law system of trial over that which has prevailed in other civilized countries, consists in the fact that the accused is never compelled to give evidence against himself. * * *
>
> "A disposition has been manifested of late to allow the accused to give evidence in his

own behalf; and statutes to that effect are in existence in some of the states, the operation of which is believed to have been generally satisfactory. These statutes, however, cannot be so construed as to authorize compulsory process against an accused to compel him to disclose more than he chooses; they do not so far change the old system as to establish an inquisitorial process for obtaining evidence; they confer a privilege, which the defendant may use at his option. If he does not choose to avail himself of it, unfavorable inferences are not to be drawn to his prejudice from that circumstance. * * * Otherwise the statute must have set aside and overruled the constitutional maxim which protects an accused party against being compelled to testify against himself, and the statutory privilege becomes a snare and a danger."

*Cooley's Const. Lim.*, 379, 384, 386.

In *Counselman v. Hitchcock*, 142 U. S., 563, the Court said:

"It is an ancient principle of the law of evidence, that a witness shall not be compelled, in any proceeding, to make disclosures or to give testimony which will tend to criminate him or subject him to fines, penalties or forfeitures."

In *Boyd v. U. S.*, 116 U. S., 616, Justice BRADLEY said:

"Any compulsory discovery * * * is contrary to the principles of a free government. It is abhorrent to the instincts of an Englishman; it is abhorrent to the instincts of an American. It may suit the purposes of despotic power, but it cannot abide the pure atmosphere of political liberty and personal freedom."

And further:

"It may be that it is the obnoxious thing in its mildest and least repulsive form; but ille-

> gitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis.*"

In *U. S. v. Three Tons of Coal*, 6 Biss., 386, the Court said:

> "The common law rule upon this subject was thus established in England, and thus it existed and was the law of that realm, when the American colonies were organized, and when this government was formed. Under the shelter of judicial decision, the subject became secure * * * and could not be compelled to accuse himself * * * and with the adoption of the fourth and fifth amendments, principles established at common law became reaffirmed in the Constitution."

The principle is well established that this constitutional provision, which has long been regarded as one of the safeguards of civil liberty, should be applied in a broad spirit, to secure to the citizen immunity from *every kind* of self-accusation.

*In re Nachman*, 114 Fed. Rep., 996.

By analogy, the case at bar is in the same class with *Boyd v. U. S.*, 116 U. S., 616, where a statute making the failure of a witness to attend and produce evidence against himself, a confession of guilt, was held unconstitutional.

Here a failure to take the stand is made an admission of guilt.

The compulsion prohibited by the Fifth Amendment is not alone physical or mental duress, such as comes from unlawful commands and authoritative orders by those engaged in extorting testimony, but comprehends also that lesser degree of compulsion which subjects the citizen to some important disadvantage by the use of means to procure the evidence which it is desired should be extracted from him.

*U. S. v. Bell*, 81 Fed. Rep., 837.

And further,

No statute, rule or regulation, or act of administration in the given case, can be constitutional, which does not in some way protect the right to be silent if the citizen chooses to be silent.

*Id.*

Calling upon a defendant in the presence of the jury, by direction of the Court, to produce a document which would have been self-incriminating, was an infraction of his constitutional rights within the meaning of this amendment.

*McKnight v. U. S.*, 115 Fed. Rep., 981.

Then why not also calling upon a defendant to explain why he did not go on the stand?

When a State violates a fundamental right of a citizen of the United States, this Court will interfere.

The laws of a State come under the prohibition of the 14th Amendment when they infringe fundamental rights.

*Ballard v. Hunter*, 204 U. S., 262.

The State has full control over the procedure in its courts, both in civil and criminal cases, *subject only to the qualification that such procedure must not work a denial of fundamental rights* or conflict with specific and applicable provisions of the Federal Constitution.

Brown v. New Jersey, 175 U. S., 175;
West v. Louisiana, 194 U. S., 263.

Where fundamental rights, specially secured by the Federal Constitution, are invaded, the Federal Courts will interfere with a State in the administration of its law for the prosecution of crime.

Rogers v. Peck, 199 U. S., 425;
Gibson v. Mississippi, 162 U. S., 563.

Due process implies, at least, conformity to natural and inherent principles of justice.

*Holden v. Hardy*, 169 U. S., 366.

In the Fourteenth Amendment, by parity of reasoning, it refers to that law of the land, in each state, which derives its authority from the inherent and reserved powers of the state, exercised within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, and the greatest security for which resides in the right of the people to make their own laws and alter them at their pleasure.

*Hurtado v. California*, 110 U. S., 516.

The purpose of the 14th Amendment "is to extend to the citizens and residents of the States the same protection against arbitrary state legislation affecting life, liberty and property as is afforded by the

Fifth Amendment against similar legislation by Congress."

*Tonawanda v. Lyon*, 181 U. S., 392.

> "The Fourteenth Amendment placed the essential rights of life, liberty and property in the several states of the Union under the ultimate protection of the national government. It was the outward manifestation of the will of the people that equality and protection to life, liberty and property should be guaranteed as the national right of Americans. The deliberate purpose of the amendment was to enforce on every foot of our soil rules of equality before the law and the rights of person and property, and to make certain that those rules could nevermore be violated according to the views or caprice of local majorities. The limitations imposed upon the States by this amendment are universal in their application. They are directed against any and every mode and form of arbitrary and unjust state action, whether legislative, executive or judicial, yet they take away no power which any free government should ever employ."

*Guthrie's 14th Amendment*, pp. 2-3.

In *Holden v. Hardy*, 169 U. S., 366, 389, the court said, referring to the 14th Amendment:

> "It is sufficient to say that there are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard, that these principles recognize the inherent rights of the individual, and are embodied and intended to be protected and secured by the fundamental law, and that the Fourteenth Amendment imposes upon the courts the duty to protect every individual or corporation from arbitrary denial or abridgement of those rights by the States."

*Id.*, p. 36.

In *O'Neil v. Vermont*, 144 U. S., 323, 370, Mr. Justice HARLAN, on behalf of himself and Mr. Justice BREWER, said:

> "I fully concur with Mr. Justice Field that since the adoption of the Fourteenth Amendment, no one of the fundamental rights of life, liberty or property, recognized and guaranteed by the Constitution of the United States, can be denied or abridged by a State in respect to any person within its jurisdiction."
>
> "These rights are, principally, enumerated in the earlier amendments of the Constitution. They were deemed so vital to the safety and security of the people, that the absence from the Constitution adopted by the convention of 1787, of express guarantees of them, came very near defeating the acceptance of that instrument by the requisite number of States."

## POINT IV.

## The plaintiff in error was prejudiced by this abridgement of his rights, privileges and immunities and by this denial of due process of law.

A defendant who does not go upon the witness stand in his own behalf, under the decisions complained of, is convicted, not by the proof that the State produces against him, but by the negative force of his failure to testify.

As the trial court remarked (Record, p. 101):

> "Now Mr. Vreedenburg will not say positively that Twining was present at the time of the exhibition or the producing of this book with the alleged false minutes in it," and again at page 102, "the accusation against Cornell

was specific by Vreedenburg. *It is rather inferential, if at all, against Twining.*"

The witness Vreedenburg (Record, p. 32), said:

"Q. By whom was the minute book handed down to you and who was present when it was handed to you?

"A. I don't think anybody was present but Mr. Cornell. I think he handed it to me. He handed it to me or I took it myself in his presence and he called my attention to the fact that the last minutes were not written in the book and showed me this paper, Exhibit 7, as being the minutes of the meeting which had not yet been transcribed into the book.

At page 41:

"A. The first talk, I think, was with Mr. Cornell, although I cannot be positive, but what Mr. Twining might have been present, the minute book was in his room, I think, on his desk.

"Q. Don't you remember already stating that Mr. Twining was in another room?

"A. Perhaps at the time of the conversation he was in another room. * * *

"Q. That is what I am speaking of, too, and haven't you already said when that was discovered by you in the book, as you have stated, Mr. Twining was in the other room?

"A. I think not.

"Q. Will you say he was not?

"A. No. I won't say whether he was or was not; Mr. Cornell was present. * * *

"Q. When did you first say anything to him with regard to this paper found in the minute book, if at all, that day?

"A. I cannot be sure that I spoke to him that day about it, I may have, I cannot be sure. * * *

"A. Well, of course, I can only state the best of my recollection. I asked for the authority to purchase the stock, and I was told that it

had been purchased by authority of the Board of Directors, and I therefore asked for the minute books in order to have the evidence of that authority—and my recollection is that I asked Mr. Cornell for it, and the book, I think, lay on Mr. Twining's desk, in his little room, on the top of the desk, that is my recollection, and the paper was flat in the book, and it was mentioned to me as a loose paper, being the minutes of the meeting. The conversation at the time was not continued much in the way of inquiry as to the meeting itself, I feel very confident that I asked Mr. Twining whether those were the minutes, but I could not be absolutely certain that that was on Saturday or on Monday.

"Q. When you went into Mr. Twining's room and found this book lying on the desk, who took the book? What was done with the book?

"A. Well, my recollection is that Mr. Cornell took the book down and handed it to me. I was right at his elbow. * * *

"Mr. Arrowsmith: Your testimony has been that it was referred to on the fourteenth; that on that date Cornell told you so. I don't think you pretended to say that Twining told you anything about it at that time?

"The Witness: I cannot say definitely that Mr. Twining said so on Saturday" (p. 46).

On page 82 the Court said:

"If Mr. Vreedenberg has left it in doubt and if Twining as a matter of fact was not present when this book was produced, why it is important for Twining to know it. If Twining was not present, I don't care how false the minutes were, if Twining did not aid and abet and cause or procure this paper to be presented or shown or exhibited or brought to the knowledge of the examiner on the particular day mentioned in the indictment, he has got to be acquitted. There can be no question about that, and if the evidence can be made more specific

by directing the attention of Mr. Vreedenberg to that particular subject, what objection is there to his going back upon the stand, and the Court allowing the State to reopen its case?

"The Prosecutor: I will recall him if the defence do not object, just to clear that point up.

"The Court: Of course, if Mr. Vreedenberg should say that Twining was not there when it was actually exhibited to him, it seems to me that the motion should prevail.

"Mr. Arrowsmith: Now, if your Honor goes that far, of course the testimony upon that point must be from the mouth of Vreedenberg, and if he says that 'I don't know,' then there is an absence of proof which is as much as to say that he was not there.

"The Court: Well, it certainly weakens the State's case against Twining very materially on that point if he says that."

Thereupon Mr. Vreedenberg resumed the stand, and at the eleventh hour, could not state more positively than as follows (Record, pp. 84-86):

"Q. Mr. Vreedenberg, at the time this paper, Exhibit 7 and the book in which it was contained was taken from Mr. Twining's room, or at the time it was examined by you or shown to you, or you first saw it, who was present?

"A. When I first saw the book and the paper in it?

"Q. I mean on the 14th?

"A. On the 14th of February I know that Mr. Cornell was present, I cannot say who else was present at the moment of its delivery, I think—

"Mr. Arrowsmith: No.

"Q. Was Mr. Twining present at any time that day when you had this paper or were examining it in his presence?

"A. Well, I have to make a conditional reply. I feel perfectly confident that he was present and that we talked about it. I have not, however, that clear and distinct recollection of talking to him about the minutes like

I have of talking to him about the purchase of the stock on that day, nor as I have of talking to him about the minutes on Monday, but I am satisfied that I asked both him and Mr. Cornell about that paper on Saturday. I remember it clearly as to Mr. Cornell on Saturday as well as on Monday. I remember it clearly as to Mr. Twining on Monday, but not clearly on Saturday.

"Q. Let me ask again, calling your attention again to Saturday when you first called Mr. Twining's attention as you say to the item in Exhibit 3, how long after that was it before you were shown these minutes?

"A. Oh, a few minutes.

"Q. Where did you hold your conversation with Mr. Twining in regard to this matter on Saturday—how long after you had the conversation with Mr. Twining about the stock purchase did you first see Exhibit 7, the alleged minutes?

"A. It was a few minutes.

"Q. Where did you have your conversation with Mr. Twining?

"A. I cannot say. It is all one room, separated by partitions, perhaps six feet high, as high as your head, you cannot see over them, they are little apartments and you pass from one to the other, and the doors are all open in going from one apartment to another, we were all more or less passing through. I cannot tell in which room many of these conversations took place. I can name some of them.

"Q. After you got the minutes in your possession did you see Mr. Twining still in the Trust Company's room?

"A. Yes, Mr. Twining was there I know late on Saturday afternoon. I could not recall that yesterday when I was on the stand, but he was there late Saturday afternoon. He may not have been there continuously.

"Q. So far as you know, after your conversation in regard to the purchase of this stock with him, did he leave the Trust Company or not at that time?

"A. How is that?

"Mr. Arrowsmith: Objected to.

"Objection overruled; defendants except.

"(Exception allowed defendants, signed and sealed accordingly.)

"Q. (Question read.) Did he go out of the building?

"A. He may have been out for an hour or so.

"Q. I say, do you know whether he did or not?

"A. I do not recollect that he did, but at the same time he may have been out for an hour or so.

"Q. You have no knowledge that he went out of the building?

"A. No, I do not recall it.

"Cross-examination by Mr. Arrowsmith:

"Do you recollect saying yesterday in reply to me, do you remember my asking you this question:

"'Q. When did you first say anything to him (Twining) with reference to this paper found in the minute book, if at all, that day?' That is, Saturday, the 14th.

"Do you remember my asking you that question?

"A. I remember you asking me some such question as that, and I was trying then—

"Q. Do you remember testifying in answer to that: 'A. I cannot be sure that I spoke to him that day about it. I may have, I cannot be sure.'

"A. Yes, sir.

"Q. You said that?

"A. Yes, sir.

"Q. That was true?

"A. That is true, *I cannot be sure that I talked with him on Saturday.* I feel confident that I did, but I am not absolutely certain.

"Q. I don't want your explanations, I want

to know if you said that and if that is true?

"A. I did, yes, sir.

"Q. And I asked you: 'Q. But you have no recollection of it? That is what I understood on your direct-examination.' And did you reply, 'My recollection of when I talked to him at length about it was on Monday afternoon.' 'Q. That was on the 16th? A. That was on the 16th, yes,' and do you remember this question, 'Q. The first talk that you can recall with any certainty, at any rate, in reference to this paper, Exhibit 7, was on Monday some time?'

"Do you remember that question?

"A. Yes, with certainty.

"Q. And you remember replying: 'That is the first that I will be sure of talking with him in regard to the paper itself?'

"A. Yes, that is the first that I can be certain of talking about it.

"Q. Well, sure you said?

"A. I don't care which, sure.

"Q. And you say so still?

"A. Yes, sir."

Miss Rittenhouse, the stenographer (Record, pp. 47-52), could not testify more clearly than:

Referring to Exhibit No. 7:

"Well, I cannot say who wrote it, it was written on the typewriter; I presume that I wrote it" (p. 47).

Referring to Exhibit No. 4, at page 48:

"That was dictated by Mr. Vreedenberg. That is, I took it down as Mr.—I think it was Mr. Twining, but I am not sure, though, it does not say on my book who."

Referring to Exhibit No. 8:

"Q. How did you come to make that corrected copy, Miss Rittenhouse, at whose request?

"A. At Mr. Twining's, I think; I am not positive, though, about that" (p. 49).

"Q. I show you a paper marked No. 12 and ask you whose signature that is?

"A. I think that is Mr. Twining's.

"Q. I also show you a paper marked No. 14 and ask you whose signature that is?

"A. Well, I think that is mine.

"Q. Whose name is signed to it?

"A. Mr. Twining's name.

"Q. How did you come to sign that with Mr. Twining's name?

"A. I suppose I was told to do it by Mr. Twining" (p. 50).

"Q. Do you know when this conversation took place, the date of it?

"A. I cannot say positively, I think it was Monday" (p. 62).

Upon such proof as this, upon the comment of the Prosecutor (pp. 90, 94) and upon the comment contained in the charge of the Court (pp. 99-103) this case was submitted to the jury.

In the language of the Court in Angelo v. People, 96 Ill., 209, commenting upon the reference to the failure of the accused to testify:

> "*Who can say that this inadvertence may not have produced the verdict of guilty?*"

## POINT V.

We respectfully submit that by the foregoing we have established:

(1) A Federal question has been properly raised reviewable by this Court;

(2) The rights, privileges and immunities of the plaintiff in error, as a citizen of the United States

were abridged, his fundamental rights violated, and due process of law denied him by the action of the State Courts and he has been prejudiced thereby.

**The judgment should be reversed.**

JOHN G. JOHNSON,
WILLIAM W. GOOCH,
HERBERT C. SMYTH,
FREDERIC C. SCOFIELD.
Counsel for Plaintiff in Error, Albert C. Twining.

FEB 8 1908
JAMES H. McKENNEY,
CLERK.

# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1907.**

**No. ~~157~~ 10**

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ALBERT C. TWINING AND DAVID C. CORNELL,
PLAINTIFFS IN ERROR,

*vs.*

THE STATE OF NEW JERSEY.

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IN ERROR TO THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY.

## BRIEF FOR DAVID C. CORNELL.

MARSHALL VAN WINKLE,
*Attorney.*

SUPREME COURT OF THE UNITED STATES.

ALBERT C. TWINING AND
DAVID C. CORNELL,
*Plaintiffs in Error,*
*vs.*
THE STATE OF NEW JERSEY.

} *In Error.*

## Brief for David C. Cornell.

### STATEMENT.

Plaintiffs in Error were convicted in the Monmouth County (New Jersey) Sessions Court of the offense of Exhibiting False Minutes, under the 17th Section of the New Jersey Act Concerning Trust Companies, which makes it an offense for any officer or director of any trust company to wilfully or knowingly subscribe or exhibit any false paper, with intent to deceive any person authorized to examine as to the condition of such trust company.

Contentions as to the falsity of the minutes, their exhibition by either or both of the Plaintiffs in Error, and the character of the minutes as a "paper" under Section 17 of the Trust Company Act were raised in the New Jersey Court of Errors and Appeals, and decided adversely to Plaintiffs in Error.

The Plaintiffs in Error complain that the trial judge violated their constitutional rights, in that when they exercised their right to remain silent

and give no testimony, he commented upon that, with speech very prejudicial to them, and thus compelled them to testify against themselves.

There is no question as to the prejudicial nature of the language used by the trial judge, nor any as to its self-criminating character.

The language of the trial judge with respect to the Plaintiff in Error Cornell was more prejudicial than the language used with respect to the other Plaintiff in Error; and Cornell's attitude, in not testifying in his own behalf, was thus made especially self-criminating, in a comparative and distinguishing manner.

The matter complained of, with respect to the rights of Plaintiffs in Error under the Federal Constitution, was duly raised in the New Jersey Court of Errors and Appeals by assignments of error (p. 138, Transcript).

Twining was the President and Cornell the Cashier of the Monmouth Trust and Safe Deposit Company at Asbury Park, N. J., at the time of the alleged offense, and it was minutes of a directors' meeting of that company that were drawn in question.

Upon their conviction Twining was sentenced to an imprisonment of 6 years and Cornell to one of 4 years.

## ERRORS ASSIGNED.

The trial judge charged the jury in part as follows:

"Now, was that meeting held or not?

"That paper says that at this meeting were present among others, Patterson, Twining and Cornell.

"Mr. Patterson has gone upon the stand and has testified that there was no such meeting to his knowledge; that he was not present at any such meeting; that he had no notice of any such meeting, and that he never acquiesced, as I understand, in any way, in the passage of a resolution for the purchase of this stock.

"Now, Twining and Cornell, this paper says, were present. They are here in Court, and have seen this paper offered in evidence, and they know that this paper says that they were the two men, or two of the men, who were present. Neither of them has gone upon the stand to deny that they were present, or to show that the meeting was held.

"Now, it is not necessary for these men to prove their innocence. It is not necessary for them to prove that this meeting was held. But the fact that they stay off the stand, having heard testimony which might be prejudicial to them, without availing themselves of the right to go upon the stand and contradict it, is sometimes a matter of significance.

"Now, of course in this action, I do not see how that can have much weight, because these men deny that they exhibited the paper, and if one of these men exhibited the paper and the other did not, I do not see how you could say that the person who claims he did not exhibit the paper would be under any obligation at all to go upon the stand. Neither is under any obligation. It is simply a right they have to go upon the stand, and, consequently the fact that they do not go upon the stand to contradict this statement in the minutes, they both denying through their counsel and through their plea, that they exhibited the paper, I don't

see that that can be taken as at all prejudicial to either of them—they simply have the right to go upon the stand and they have not availed themselves of it, and it may be that there is no necessity for them to go there—I leave that entirely to you."

* * * * * *

(See pages 98-99 Transcript).

"Now gentlemen, if you believe that that is so; if you believe this testimony that Cornell did direct this man's attention to it—Cornell has sat here and heard that testimony and not denied it—nobody could misunderstand the import of that testimony; it was a direct accusation made against him of his guilt—if you believe that testimony beyond a reasonable doubt, Cornell is guilty. And yet he has sat here and not gone upon the stand to deny it. He was not called upon to go upon the stand and deny it, but he did not go upon the stand and deny it, and it is for you to take that into consideration.

"Now, Twining has also sat here and heard this testimony, but you will observe that there is this distinction as to the conduct of these two men in this respect, the accusation against Cornell was specific by Vredenburgh. It is rather inferential if at all, against Twining, and he might say—it is for you to say whether he might say, 'Well, I don't think the accusation against me is made with such a degree of certainity as to require me to deny it, and I shall not; nobody will think it strange if I do not go upon the stand to deny it, because Vredenburgh is uncertain as to whether I was there; he won't swear that I was there,' so consequently the fact that Twining did not go upon the stand can have no significance at all.

"You may say that the fact that Cornell did not go upon the stand has no significance. You may

say so, because the circumstances may be such that there should be no inference drawn of guilt or anything of that kind from the fact that he did not go upon the stand. Because a man does not go upon the stand you are not necessarily justified in drawing an inference of guilt—but you have a right to consider the fact that he does not go upon the stand where a direct accusation is made against him."

(See pages 102-103 Transcript).

On this charge it is assigned for error:

1. (pp. 149-150, and 152-153). That this charge was in violation of the Fourteenth Amendment of the Constitution of the United States, in that thereby the privileges and immunities of the Plaintiffs in Error as citizens of the United States were abridged, in that they were thereby deprived of the fundamental right and immunity not to be compelled to testify or be witnesses against themselves, or called on in the presence of the trial jury to testify or be witnesses against themselves, or to furnish or to be called on in the presence of said jury to furnish testimony or evidence against themselves in the trial of a prosecution like this involving their liberty and property.

2. (pp. 150-151 and 154-155). That this charge was in violation of the Fourteenth Amendment of the Constitution of the United States, in that thereby the Plaintiffs in Error were deprived of their liberty and property without due process of law.

3. (pp. 151-152 and 155-156). That this charge was in violation of the Fourteenth Amendment of the Constitution of the United States, in that the Plaintiffs in Error were denied the equal protection

of the laws, guaranteed by said Amendment of the Constitution.

These assignments are severally insisted upon, as they are herein referred to, and as they appear in the Transcript at the pages indicated.

At the trial a general exception to the charge was taken (p. 103, Transcript) and error was assigned under this general exception, upon the portions of the charge complained of in this brief (pp. 120–121, Transcript) in accordance with the New Jersey Criminal Procedure Statute (Pam. Laws N. J., 1898, p. 916). There was taken also an exception specially (p. 103, Transcript) to those portions of the charge; and the language of the charge was embodied in the bills of exceptions.

## POINTS.

### I.

**The language of the charge was prejudicial to the plaintiffs in error, and its effect was to convert their silence into self-crimination; and the presumption of innocence, to which they were entitled, was swept away, otherwise than by legal evidence. This was especially so with respect to Cornell.**

The words of the charge complained of may be summarized as follows: "Cornell has sat here and heard that testimony and did not deny it. You are therefore justified in inferring that he is guilty of the crime charged, and may so find." This surely was compulsory self-crimination.

Some of the exact words of the charge were: "Cornell has sat here and heard that testimony, and did not deny it. Because a man does not go upon the stand you are not necessarily justified in drawing an inference of guilt."

The jury were thus plainly told that they were justified in drawing the inference of guilt from the fact that Cornell did not exercise his right to testify in his own behalf; that they need not do it, *but that they might.*

With this charge in view it is fair to say that Cornell's conviction was the result of this charge. The jury were told that they might convict on the inference of guilt arising from his failure to testify. And they did convict.

After reciting the nature of the testimony and the accusation against the plaintiffs in error the

charge contains these words, "so consequently, the fact that Twining did not go upon the stand can have no significance at all."

This language compared the conduct of Twining in remaining silent with that of Cornell. The statement that Twining's silence could have "no significance at all," when the trial judge was comparing the conduct of the two men plainly implied that Cornell's silence *did* have "significance."

Take the paragraph of the charge containing the statement and this will be seen: "Now, Twining has sat here and heard this testimony, but you will observe there is this distinction between the two men in this respect—the accusation against Cornell was specific by Vredenburgh. It is rather inferential, if at all, against Twining, and he might say—it is for you to say whether he might say, "Well, I don't think the accusation against me is made with such a degree of certainty as to require me to deny it, because Vredenburgh is uncertain as to whether I was there; so consequently, the fact that Twining did not go upon the stand can have no significance at all."

Thus the trial judge distinctly told the jury that if Twining were placed in the same circumstances as Cornell with respect to the testimony and the accusation, he would be *required* to go upon the stand to *deny* the accusation, and this was plainly telling the jury that although Twining was not required to take the stand and deny the accusation, Cornell was so required.

This surely forced the attitude of Cornell in not testifying into not only a presumption but a conclusion of guilt, and plainly amounted to self-crimination.

The words of the charge tended to persuade the

jury that the omission of the plaintiffs in error to testify, implied an admission or a consciousness of the crime charged.

Commonwealth v. Scott, 123 Mass., 241 (1877).

So far as the charge made the silence of plaintiffs in error an admission, that was a compelling of the plaintiffs in error to testify against themselves, with the same effect as though they arose and with express words made an admission of guilt; and so far as the charge made that silence appear as a consciousness of guilt, it converted the very attitude of the plaintiffs in error in exercising their right to be present at their own trial, into compulsory evidence against themselves.

And this was especially so with respect to Cornell.

The charge, as given, would seem to indicate that the circumstances relied upon as proving the guilt of the plaintiffs in error, had, in the mind of the jury, been entitled to additional weight as evidence, from the fact that they had not been sworn, and from it the jury were misled and induced to regard the fact that they had not been sworn as one circumstance against them, and as giving point and effect to all the others.

See Ruloff v. People, 45 N. Y., 223 (1871).

Consider the words of the charge further:

"But the fact that they stay off the stand, having heard testimony which might be prejudicial to them, without availing themselves of the right to go upon the stand and contradict it, is sometimes a matter of significance."

This plainly was a direction by the trial judge to the jury that the fact that the accused did not

take the stand was a matter of "significance," that is, of "importance" (*vide* Century Dictionary, vol. 7, p. 5625), to be considered by the jury, in arriving at their conclusion as to the guilt of the accused.

The word "significance" must be taken in connection with the fact that if anything happening at the trial had "significance," it was only in connection with the trial which was being held to ascertain the guilt of the accused, and "significance" in connection with that guilt. Neither judge nor jury was performing an idle function. The word "significance" bore entirely upon the question of guilt. It had no relation to a finding by the jury of the innocence of the accused.

It would be a strained construction indeed which would claim that a statement like the one under examination was in any way beneficial to the accused. The statement is that the failure of the accused to take the stand was a failure to contradict the testimony that might be prejudicial. Their failure to expressly assert innocence otherwise than by their plea of not guilty is pointed out as a "significant" thing. Evidence that was only such as might be prejudicial thus became really prejudicial in the consideration of the jury by virtue of the direction of the trial judge.

This was plainly in substance a direction that if the jury in their consideration of the case should believe that the evidence offered by the prosecution was not sufficient to prove the guilt of the accused beyond a reasonable doubt, that then the jury might consider the "significant" or "important" fact that the accused had not availed themselves of their right to testify, in the face of evidence which "might be prejudicial to them." It must be noted that the language is not that the evidence was prejudical, but that it might be so. If the language were that

the failure of the accused to testify were significant or important because the evidence against them were prejudical, it would still be vicious and would amount to self-crimination; but it is much more vicious and self-criminating, when the plain meaning of the language is that with the evidence only such that it might be prejudicial, still, in that situation, the failure of the accused to testify was significant or important, and because of that fact it became prejudicial, or the equivalent of guilt.

The accused had the right to remain silent. Their right was not affected whether or not they had heard testimony which might be prejudicial to them. That was not a test of their right to remain silent. Their right to remain silent existed for reasons irrespective of their guilt, or the character of the evidence adduced. If the statement of the trial judge is correct that their failure to testify was an important thing to be considered against them because there had been presented evidence that might be prejudicial, then their right to remain silent was a graduated one,—it was absolute when the trial began, and as evidence that might be prejudicial was developed, the right became questionable, and their failure to testify an important or significant thing for the jury to consider, and a situation that might convert evidence that only might be prejudicial into evidence that was really prejudicial; and lastly, if the evidence adduced was conclusive, then, the failure of the accused was not only significant, or important, but it amounted to an admission of guilt; and all this without a word from the accused, and the motive for their silence undisclosed. The trial judge made the silence of the accused a question of guilty motive, and not a matter of absolute legal right.

Consider the words of the charge further:

"They simply have the right to go upon the stand and have not availed themselves of it, and it may be that there is no necessity for them to go there—I leave that entirely to you."

What was thus left entirely to the jury? The question of whether there was any necessity for the accused to go upon the stand. And the jury were thus told that it might be that it was necessary for the accused to go upon the stand. Who can say that the jury did not find, under this direction, that the accused were under the necessity of testifying in view of the evidence which the jury considered was not itself conclusive of guilt, but which the accused might have explained away if they had taken the stand?

This direction was a violation of the rights of the accused, for the jury were told that they were to determine the law as to the right of the accused to remain silent. That was left "entirely" to them.

Of course if it ever became "necessary" for an accused man to testify, against his wish to do so, that would be compulsory self-crimination. And to leave the "necessity" to the determination of the jury was to convert the silence of the accused in this case into a refusal to do a necessary thing as determined by the jury, and this refusal became compulsory self-crimination.

The verdict of the jury must be taken as meaning that they determined that the accused were under the necessity of testifying, and had not done so.

Consider the words of the charge further:

In speaking of Cornell,—"He was not called upon to go upon the stand and deny it, but he did not go upon the stand and deny it, and it is for you to take that into consideration."

The "consideration" of the jury was for the purpose of ascertaining whether the accused were guilty. Their "consideration" had no other end. To direct them to consider the failure of the accused to ake the stand, was expressly saying that they might consider this failure in ascertaining whether the accused were guilty. And if this entered into their ascertainment, it was an element in the determination of the guilt of the accused, and thus compulsory self-crimination.

Consider the words of the charge further:

"You may say that the fact that Cornell did not go upon the stand has no significance. You may say so, because the circumstances may be such that there should be no inference drawn of guilt or anything of that kind from the fact that he did not go upon the stand. Because a man does not go upon the stand you are not necessarily justified in drawing an inference of guilt—but you have a right to consider the fact that he does not go upon the stand where a direct accusation is made against him."

If "the circumstances may be such that there should be no inference drawn of guilt," also, the circumstances may be such that an inference of guilt should be drawn. And who is to determine when the circumstances are such that an inference of guilt is not to be drawn? The charge before us lays down no general rule on this head applicable to all cases, nor does it state whether the circumstances of this case put it in the class where an inference of guilt should not be drawn; so that the matter having thus been left to the jury to be wholly determined by them, it must be held that the jury found that the circumstances of this case were such that an inference of guilt should be drawn from the fact that Cornell did not go upon

the stand, and that they drew such inference, and found him guilty accordingly.

I contend that the several statements of the charge covered by the assignments of error placed the plaintiffs in error, and certainly Cornell, in a situation where they were compelled to testify against themselves.

If any presumption or inference was created by the language complained of, it must have been a presumption against the innocence of the accused, or an inference to the effect that they were guilty. It is a fundamental principle and right of a defendant in an indictment, that he is presumed to be innocent until proven guilty beyond a reasonable doubt.

As Mr. Justice Field said, in Wilson v. United States (149 U. S., p. 65, 1892), "To prevent such presumption" (against the accused) "being created, comment, especially hostile comment, upon such failure" (to testify) "must necessarily be excluded from the jury. The minds of the jurors can only remain unaffected from this circumstance by excluding all reference to it."

The minds of the jurors were affected by the many and strong references in the charge *sub judice*. To what extent they were affected appears by the fact that they returned a verdict of guilty.

"At common law no one accused of crime could be compelled to give evidence in a prosecution against himself, nor was he permitted to testify in his own behalf. The accused might rely upon the presumption of law that he was innocent of the charge, and leave the government to establish his guilt the best way it could.

"This rule, while affording great protection to

the accused against unfounded accusation, in many cases deprived him from explaining circumstances tending to create conclusions of his guilt which he could readily have removed if permitted to testify. To relieve him from this embarrassment the law was passed. In mercy to him, he is by the act in question, permitted upon his request to testify in his own behalf in the case. In a vast number of instances the innocence of the defendant of the charge with which he was confronted has been established.

"But the act was framed with a due regard also to those who might prefer to rely upon the presumption of innocence which the law gives to every one, and not wish to be witnesses. It is not every one who can safely venture on the witness stand, though entirely innocent of the charge against him. Excessive timidity, nervousness when facing others, and attempting to explain transactions of a suspicious character, and offenses charged against him, will often confuse and embarrass him to such a degree as to increase rather than remove prejudices against him. It is not every one, however honest, who would therefore willingly be placed on the witness stand. The statute, in tenderness to the weakness of those who from the causes mentioned might refuse to ask to be a witness, particularly when they may have been in some degree compromised by their association with others, declares that the failure of the defendant in a criminal action to request to be a witness shall not create any presumption against him."

Wilson v. United States (1892), 149 U. S., 66.

Although the words of the Federal statute are, "shall not create any presumption against him," yet Mr. Justice Field, in the Wilson case just referred to,

in dealing with the language used by the district attorney in summing up which had been assigned for error, said: "Nothing could have been more effective with the jury to induce them to disregard entirely the presumption of innocence to which by the law he was entitled." Here it will be seen that Mr. Justice Field held that it was the presumption of innocence to which the defendant was entitled that was disregarded—not that any presumption "against him" was "created" which could, of course, only be a presumption tending to prove guilt. He thus held that the presumption of innocence that attached to the defendant, for his benefit, under the rules of the common law, was the thing that had been disregarded. And this was something independent of the Federal statute.

Surely when this presumption of innocence was taken from the plaintiffs in error by the construction placed by the trial court upon their act in electing to remain silent, they thereby furnished evidence and were compelled to testify against themselves.

If it was necessary to add to or mingle with the evidence adduced by the prosecution an inference as to guilt arising from the plaintiffs in error not testifying, then the prosecution was not discharging the burden of proving their guilt; but was placing part of the burden upon the accused, and that part of the burden was borne under compulsion.

If the guilt of the plaintiff in error Cornell could be legally inferred from the very act of exercising his option as to going upon the stand as a witness, which he was necessarily compelled by the adoption of the statute to exercise one way or the other, such inference was a crimination of himself.

People v. Tyler, 36 Cal., 522 (1869).

This decision was based upon the California En-

abling Act, wherein the words "his neglect or refusal to testify shall not create any presumption against him," or the similar words found in the Enabling Acts of the different states, are not found.

As bearing upon the form of the thing claimed to have been self-crimination, and my contention that the plaintiffs in error testified against themselves, although they were not called upon to actually speak express words, and irrespective of any constitutional question, attention is called to an excerpt from the opinion of Mr. Justice Field, in the case of Cummings v. Missouri, 4 Wall, 277 (1866), as follows:

"The difference is one of form only, and not of substance. * * * The clauses differ in that they declare the guilt instead of assuming it. The deprivation is effected with equal certainty in the one case as it would be in the other, but not with equal directness. * * * The legal result must be the same, for what cannot be done directly cannot be done indirectly. The Constitution deals with substance, not shadows. Its intention was levelled at the thing, not the name. * * * If the intention can be evaded by the form of the enactment, its insertion in the fundamental law was a vain and futile proceeding."

It has been suggested, as by Justice Appleton, in Maine (before the passage of the Maine statute), that there is no actual compulsion, as prohibited by the rule, in allowing an inference to be drawn against one accused on his failure to take the stand, for the accused has an option, and the exercise of this option, by choosing silence, is therefore a voluntary act of his own. But surely, the answer to this is, that by hypothesis, the answer will be criminating (and it is the ignoring of this hypothesis

which seems to form the fallacy of Justice Appleton). Thus the supposed option lies between answering in confession of the criminating fact, or keeping silence, and letting the same fact be inferred, which is no option at all.

I contend, therefore, on the reasons advanced, that the plaintiff in error, Cornell, was compelled to testify or to furnish evidence against himself; and, also, that the presumption of innocence, to which he was entitled, was swept away, otherwise than by legal evidence.

## II.

**The fundamental right and immunity guaranteed (a) by the common law from ancient times, and (b) by the Constitution of the United States that a defendant in a criminal case shall not be compelled to testify or give evidence against himself, was violated, to the prejudice of plaintiffs in error.**

The 57th Section of the Criminal Procedure Act of New Jersey of 1898 (Pam. Laws, N. J., 1898, p. 886) is substantially a re-enactment of the 8th Section of a former New Jersey Evidence Act (Compilation Statutes, Vol. 2, p. 1398); and provides that, "upon the trial of any indictment, the defendant shall be admitted to testify, if he shall offer himself as a witness." The genesis of the New Jersey legislation may be found set forth in State v. Zdanowics, 55 Atl. Rep., p. 744.

The Federal statute permitting defendants in the United States Courts and in the Territorial Courts to testify, has this addition: "And his failure to make such request (to testify) shall not create any presumption against him" (U. S. Compiled Statutes, 1901, Vol. 1, p. 660, Sec. 858).

Under this Federal statute it has been held that the words "shall not create any presumption against him," forbid all comment in the presence of the jury.

Wilson v. U. S., (1893) 149 U. S., 60 (1892).

The Federal statute is a fair example of the wording of the Enabling Acts in nearly all the States of the Union, the letter as well as the spirit of the statutes thus clearly announcing that the failure of the accused to avail himself of the right to testify creates no presumption against him, and does not tend to prove his guilt.

The Enabling Act of New Jersey has been construed by the courts of New Jersey in two reported cases, in addition to the case *sub judice*. The case of Parker v. State, 32 Vroom (N. J.), p. 308, decided in 1898, raised, for the first time in New Jersey, the question of the effect, if any, to be attributed to the failure of the defendant in an indictment to avail himself of the right accorded by the New Jersey statute to be a witness in his own behalf. The court held in that case that because the Enabling Act of New Jersey did not contain an express restriction, that in all cases it did not impliedly prohibit consideration and comment upon the failure of the accused to avail himself of the privilege accorded to him. It is to be observed that this decision in New Jersey stands quite by itself, and that the court held that in some cases the failure of the accused to testify may be commented upon, and in others it may not be. No distinct line is prescribed. However, giving this opinion full weight, it was no authority for the charge of the court in this case. The language of the Parker case opinion was: "But when the accused is upon trial and the evidence tends to establish

facts which, if true, would be conclusive of his guilt of the charge against him, and he can disprove them by his own oath as a witness, if the facts be not true, then his silence would justify a strong inference that he could not deny the charges. The rights of the accused are not invaded or denied by proper comment on his silence."

The uncertainty of this decision, and the danger attending the application of it to specific cases, and the difficulty of ascertaining in what cases comment can be made, and also what is proper comment, are shown by the opinion in the case of State v. Wines, 36 Vroom (N. J.), p. 31, delivered in 1900. This is the only case, on this head, in New Jersey, other than the Parker case. In this Wines case the trial judge in his charge to the jury quoted the exact words of the opinion in the Parker case above referred to, but the charge met with disaster in the appellate court. The appellate court said, on the authority of the opinion in the Parker case, citing that, and relying on that, and having no other authority for the utterance, that "It was proper that the judge in submitting the case to the jury should have referred to their failure to testify, and also call witnesses to establish the defence by way of alibi, as circumstances in the case." Yet the conviction in the Wines case was set aside because the appellate court held that it was not proper for the trial court to apply the doctrine of the Parker case to the facts of that case.

Under the authority of this Wines case, the language of the trial court in the case *sub judice* was improper. But it was held proper by the Court of Errors of New Jersey, although without any expressed analysis of the language of which Plaintiffs in Error then complained, and of which they now complain, so that the point was decided adversely

to them by the highest Court of New Jersey, and they are here for relief.

The language of the trial court in Parker v. State was mild and only bare comment. The indictment was for keeping a disorderly house in the sale of intoxicating liquors without a license. Several witnesses had testified to repeated sales of liquor having been made by the accused to them, and to others in their presence. Thereupon the trial court said: "The defendant has heard this evidence, but has remained in his seat without attempting to deny or contradict the testimony given by the State's witnesses; neither has any other witness been called to refute it. Under the circumstances the court submits the case for your determination." But the trial judge did not say that the jury was justified in drawing an inference of guilt from the failure of the accused to testify. It would seem that he purposely refrained from saying that. The comment was as innocuous as comment could be. And with this mild kind of comment, in a case, apparently, of positive guilt, the appellate court laid down the principle that is again mentioned in the reports of New Jersey, outside of the case in hand, only in the Wines case, there to be substantially repudiated, and held not to sanction a kind of comment that was, like the charge in the case in hand, hurtful to the accused.

The construction thus placed upon the New Jersey act by the courts of New Jersey fits the situation to the terms of the first clause of the second sentence of Section 1 of the Fourteenth Amendment to the Constitution of the United States, providing that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," for if the right or

immunity of the accused to not testify, and to have no comment to his predjudice made thereon by the trial court is a fundamental right or immunity, and if the New Jersey act, as made and enforced by the interpretation thereof by the courts of New Jersey, as referred to, sanctions such comment by a trial court as amounts to compulsory self-crimination, then the right or immunity of the accused was abridged in violation of the Fourteenth Amendment.

That the acts of the state judiciary in these respects is the act of the state is well settled.

Virginia v. Rives (1879), 100 U. S., 313.

Strauder v. West Va. (1879), 100 U. S., 303.

Neal v. Delaware (1880), 103 U. S., 370.

Yick Wo v. Hopkins (1885), 118, U. S., 374.

If the construction of the law by the court exercising authority under the State was repugnant to the Constitution, the jurisdiction of this court attaches. It is not only when a law is repugnant to the Constitution, but when the law, though constitutional, is so construed by state courts as to make its operation unconstitutional, that a writ of error lies.

Moreover, an act of a state may be constitutional as construed, and yet if the state court so enforces it as to allow compulsory self-crimination under it, the state does the deed, and the judgment must be reversed.

A trial and conviction in an unconstitutional way is as violative of a defendant's constitutional rights as a trial and conviction under an unconstitutional law.

Ex parte Neilson, 131 U. S., 176.

*(a) The plaintiff in error, Cornell, was denied a fundamental right guaranteed by the common law.*

Citizens of the United States enjoy privileges and immunities coming from an older source than the Constitution. That instrument, Article IV., Section II, speaks of those privileges and immunities. They were inherent in each citizen of a state or of the United States. They were inherited from Great Britain under the common law and Magna Charta. And among them was protection from self accusation. All the rights and immunities which belonged to a British subject under the Magna Charta, belonged to each citizen of the United States.

In the United States, almost universal legislation has decreed, in varying phraseology, that any inference from the failure of a man accused to offer himself as a witness, shall not be availed of. And in the list of states of the Union, given in Note II, on p. 3143, under section 2272, Wigmore on Evidence, are found every state except Georgia, New Jersey, and South Carolina. But in Georgia where the defendant is allowed only to make a statement, the same view has been taken, as appears in the case of Bird v. Georgia, 1874, 50 Ga., 585, 589, in the following judicial language:—

"The defendant did not make any statement to the jury on the trial as by law he was permitted to do. The court charged the jury that 'they might take into consideration the fact that the defendant failed to make a statement, and to give to that such weight as they might see fit with the other evidence, and if, upon the whole they should believe him guilty, they should so find, otherwise not.' Was this charge correct? Does it not directly imply that the failure of defendant to make a statement is, in law, some evidence against him,

and that the failure may be considered by the jury with the other evidence to determine his guilt? We do not think that the statute giving this right to a defendant intended that it should be counted against him, if he did not avail himself of it. If so, it should be stricken from the statute book."

The view as expressed in the New Jersey cases of State v. Parker and State v. Wines, was sanctioned by two courts in the country outside of New Jersey, though statutes have since controlled the subject in those jurisdictions, Maine and North Carolina.

So that, independently of any relation of the Constitution of the United States to the privilege and immunity, while the courts of the state of New Jersey hold that the privilege and immuuity still exist as they existed at the common law, unimpaired and in full force, and expressly state that the privilege and immunity do not need declaration and protection in the state constitution, yet in allowing an inference of guilt to be drawn in certain cases from the failure to testify, the state of New Jersey stands apparently in complete isolation, apart from all the other states of the Union. And she so stands although some states, for instance, California, have statutes similar to the statute of New Jersey, from which the prohibition against drawing an inference from the failure of the accused to testify is absent.

A very full history of the rise and growth of the privilege against self crimination is found in Wigmore on Evidence, Vol. III., p. 3069, Sec. 2250 et seq. And we learn there (p. 3102) that the states of the Union, with but two exceptions, Iowa and New Jersey, have at one time or another added their sanction, by their constitutions, to the principle of

the privilege, and have thus established it fully beyond the reach of ordinary legislative alteration.

"But this constitutional sanction, being merely a recognition and not a new creation, has not altered the tenor and scope of the privilege; it has merely given greater permanence to the traditional rule as handed down to us."

See, Wigmore on Evidence, Vol. III., p. 3103.

"The framers of the Constitutions did not intend to codify the various details of the rule, or to alter in any respect its known bearings, but merely to describe it sufficiently for identification as a principle. The extreme brevity of the clauses naming the privilege is plain proof of their intention. * *

"This variety of phrasing, then, *neither enlarges nor narrows* the scope of the privilege as already accepted, understood, and judicially developed in the common law."

Ibid, p. 3105.

"It is immaterial that a witness is protected by one constitution from 'testifying,' or by another from 'furnishing evidence,' or by another from 'giving evidence,' or by still another from 'being a witness.' These various phrasings have a common conception, in respect to the form of the protected disclosure."

Ibid, p. 3122.

It has been distinctly held in New Jersey, in the case of State v. Zdanowicz (1903), 55 Atlantic Reporter, p. 744, that in New Jersey no person can be compelled to be a witness against himself, and that the common law doctrine is unaltered and in full force, although the doctrine is not incorporated in the New Jersey Constitution (New Jersey being one

of the two states whose Constitutions omit the declaration of the doctrine; *vide*, Wigmore on Evidence, *supra*). This decision was upon objection made to questions asked of an accused, he having voluntarily offered himself as a witness; and the language of the Chancellor, as presiding Judge of the Court of Errors and Appeals, follows:

"The objection was made upon the ground that it was not competent cross-examination. The objection is now supported in argument on the ground that the admission of the question violated the well settled doctrine which prohibits a person accused of a crime from being compelled to testify against himself. By the Fifth Amendment to the Constitution of the United States it is, among other things, provided that no person shall be compelled in any criminal case to be a witness against himself. Many of the states have included a similar prohibition in their constitutions. There is no such prohibition in the Constitution of the State of New Jersey. It is not deemed necessary to consider whether this constitutional provision will operate to prevent any state—if it is conceivable that any state should desire to do so—from enacting laws establishing a practice in criminal cases such as is in vogue in countries not following the course of the common law, or permitting an accused person to be subject to such compulsion as may be exerted by harassing examination or other means, forcible or practically forcible, compelling him to testify against himself; or to prevent the adoption by any state of a practice which might produce that effect. Although we have not deemed it necessary to insert in our Constitution this prohibitive provision, the common law doctrine, unaltered by legislation or lax practice, is by us deemed to have its full force. In New Jersey no person can

be compelled to be a witness against himself."

So that the highest court of New Jersey has declared by its presiding judge, that the right and the immunity claimed by the plaintiff in error Cornell to have been infringed are "common law doctrine;" and that although the Constitution of New Jersey has not expressly declared it, yet the right and the immunity exist in full force as at the common law.

The right and the immunity are "fundamental," beyond the power of any of the states to abridge, either by Constitution, or by legislative enactment, or by judicial decision. The Constitutions and the statutes wherein they were expressly preserved are but reaffirmations of principles established at the common law. This was decided in the case of the United States v. Three Tons of Coal, 6 Bissell, 379, 386, in connection with the Fourth and Fifth Amendments to the Federal Constitution.

"The common law rule upon this subject was thus established in England and thus it existed and was the law of that realm when the American colonies were organized and when this government was formed. Under the shelter of judicial decision the subject became secure in his person, papers and effects, against unreasonable searches and seizures and could not be compelled to accuse himself."

U. S. v. Three Tons of Coal, 6 Bissell, 379, 386.

The "spirit" of the statute is violated, and the "principle" of it defeated by permitting an inference of guilt against an accused from his declining to avail himself of the privilege conferred upon him to testify in his own behalf. And this is so, even though the statute does not expressly prohibit such inference.

People vs. Tyler, 36 Cal., 522 (1869).
People v. Brown, 53 Cal., 66 (1885).
State v. Cameron, 40 Vt., 555 (1867).
Austin v. People, 102, Ill., 261 (1882).

The California statute is like the New Jersey statute in the absence therefrom of any prohibition against the drawing of any inference.

That the right of the accused to have no inference drawn from his failure to avail himself of the right to testify is "fundamental" is the view of the writer of an article entitled, "The Accused as Witnesses," which appeared in the Criminal Law Magazine for May, 1883 (Vol. 4, No. 3), from which I quote:

"In fourteen of the states and one territory, the statutes prescribe that upon the neglect or refusal of a defendant to testify, no reference shall be made thereto, nor comment made thereon by either the opposing counsel or the Court. These provisions, if the views hereinbefore expressed be correct, are needless; nevertheless, they are of value, since it is not merely the spirit of the fundamental, but the letter of the subsidiary law that is violated by their disregard, leaving to the injured defendant two chances for a rectification rather than one."

*(b) A constitutional right and an immunity of plaintiffs in error were violated.*

That this great right might not be encroached upon by the Federal Government, it was expressly included within the Fifth Amendment; and thus in the Federal Courts, at least, it is a privilege and immunity of citizens of the United States.

It has never been held that this right so definitely guaranteed by the Fifth Amendment, is not also

guaranteed by the Fourteenth; and indeed the question is expressly left open by the decisions of this Court.

The cases which hold that the Fourteenth Amendment has not extended the provisions of the Fifth Amendment to the States, do not apply to *all* the provisions of the Fifth Amendment.

Among these are the leading cases of Brown v. New Jersey, 175 U. S., 582, and Maxwell v. Dow, 176 U. S., 581, for instance, holding that jury trials and indictments are not guaranteed by the Fourteenth Amendment. They do not hold that *none* of the privileges and immunities guaranteed by the first ten amendments were included in the Fourteenth. The force of these decisions is simply that there can be due process of law in the states without jury trials. As was said by Mr. Justice Bradley, in the Slaughter House cases, 16 Wall., 36, the determination of just what privileges and immunities of the citizens of the United States, the states cannot abridge, must wait until cases involving those privileges or immunities are properly presented to the Court. The cases above named attempted to bring within the purview of the Fourteenth Amendment only one privilege guaranteed by the earlier amendments.

No case has ever presented for determination the right and immunity squarely put in issue by the record and assignments of error in this case.

An interesting statement in this connection—and one which can hardly be abbreviated—setting forth the grounds of the contention of the plaintiff in error Cornell, is found in William D. Guthrie's Lectures on the Fourteenth Amendment, published in 1898; and it follows:—

"The second sentence of Section 1 provides that

'No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.'

"This language presents a question of the greatest personal interest to every citizen. What are the privileges and immunities of citizens of the United States which are thus not to be abridged by the States? It must surely be those privileges and immunities which attach to citizens of the United States *as such*, and not as citizens of any particular State or Territory embraced within the Union; it must be those privileges and immunities which belong to them as citizens under the government established by the Constitution of the United States and regulated by the laws of Congress—the privileges and immunities that James Wilson would have characterized as 'federal liberty.' Among those privileges and immunities are the fundamental rights of the individual which are mentioned in the first eight amendments to the Constitution. These early amendments are known as the Federal Bill of Rights. They secure, as respects the federal government, the free exercise of religion; freedom of speech and of the press; peaceable assemblage and petition; keeping and bearing arms; immunity against the quartering of soldiers in the time of peace; security against unreasonable searches and seizures; presentment and indictment by a grand jury in case of accusation of infamous crime; security against being twice put in jeopardy, and being forced to testify against one's self; due process of law; compensation for private property taken for public use; speedy public trial; confrontment with witnesses; compulsory process for obtaining witnesses and the assistance of counsel; trial by jury in suits at common law; and immunity

against excessive bail, excessive fines and unusual punishments.

"Unless the privileges and immunities of citizens of the United States are derived from the Constitution of the United States, it is difficult to see from what source they are derived. They cannot have their origin in the constitutions or laws of the respective states, because those constitutions and laws create or declare the privileges and immunities of their own citizens, not of citizens of the United States. Moreover, the privileges and immunities created by the constitution and laws of one state are not the same as those created by the constitution and laws of another. They might differ in every state. If the true interpretation be that these privileges and immunities are such as the states grant, not only may the privileges and immunities protected by the Fourteenth Amendment be inconsistent with each other, but the protection afforded may be continually varying on account of changes in the constitutions and laws of the different states. As was well said by the Supreme Court in one of the earliest cases construing the amendment, 'In regard to that amendment counsel for the plaintiff in this Court truly says that there are certain privileges and immunities which belong to a citizen of the United States as such; otherwise it would be nonsense for the Fourteenth Amendment to prohibit a state from abridging them.'

"There can be no doubt that the Reconstruction Committee understood and contemplated that among the privileges and immunities they were seeking to protect against invasion or abridgment by the states were included those set forth in the first eight amendments. The Committee's report declared that it was necessary to have such 'changes of the organic law as shall determine the civil rights and

privileges of all citizens in all parts of the Republic.' In submitting the amendment to the Senate on behalf of the Committee, Senator Howard presented what he said were 'the views and the motives which influenced that committee * * * and the ends it aims to accomplish.' Speaking of the privileges and immunities of citizens of the United States, he said, 'We may gather some intimation of what probably will be the opinion of the judiciary by referring to a case adjudged many years ago.' He then quoted at length from Corfield v. Coryell, 4 Wash., C. C. Rep. 371, 380, and proceeded to say: 'Such is the character of the privileges and immunities spoken of in the second section of the Fourth Article of the Constitution. To these privileges and immunities, whatever they may be—for they are not and cannot be fully defined in their entire extent and precise nature,—to these should be added the personal rights guaranteed and secured by the first eight amendments of the Constitution: such as the freedom of speech and the press; the right of the people peaceably to assemble and petition the government for a redress of grievances, a right appertaining to each and all the people; the right to keep and bear arms; the right to be exempted from the quartering of soldiers in a house without the consent of the owner; the right to be exempt from unreasonable searches and seizures, and from any search or seizure except by virtue of a warrant issued upon a formal oath or affidavit; the right of an accused person to be informed of the nature of the accusation against him, and his right to be tried by an impartial jury of the vicinage; and also the right to be secure against excessive bail and against cruel and unusual punishments." After further discussion Senator Howard continued, 'the great object of the first section of this amendment is, therefore, to restrain the power of the

states and compel them at all times to respect these great fundamental guaranties.'

"For these statements as to the declared purpose of the framers, officially and authoritatively made to the Senate on behalf of the Reconstruction Committee, it would seem to be entirely clear that the intention was that the essential rights of life, liberty and property, distinctly recognized in the Constitution and in the first eight amendments, should, by the Fourteenth Amendment, be made the indisputable and secure possession of every citizen of the United States, beyond the power of any State to abridge. Yet the result of judicial interpretation has been almost to uphold the contention that the clause in question is practically meaningless and superfluous, and that the states may abridge and deny many of the rights expressly recognized in and by the first eight amendments, notwithstanding the avowed purpose and intention of the Reconstruction Committee, and of Congress. But although the decisions of the Supreme Court tend to support the view that the States may invade and deny many of the privileges and immunities of United States citizens thus mentioned, except in so far as they are protected by the provision requiring due process of law and equal laws, it cannot be said that the question has ever been adequately presented to the Court or decided by it. The power of the States to abridge these great rights of citizens can never be conceded until the Court shall expressly so decide in a case involving the exact question and adequately argued.

"The point that the privileges and immunities of citizens of the United States include the rights protected by the first eight amendments was made in the case of the Chicago Anarchists in 1887—Spies v. Illinois—by Mr. John Randolph Tucker, a dis-

tinguished advocate and constitutional lawyer. Chief Justice Waite mentioned the contention in the opinion of the Court, but it was found unnecessary to decide the question. In April, 1892, Mr. Justice Field—dissenting in O'Neill v. Vermont—said that, after much reflection, he thought that the privileges and immunities of citizens of the United States were such as had their recognition in or guaranty from the Constitution of the United States. 'This definition,' he added, 'is supported by reference to the history of the first ten amendments to the Constitution, and of the amendments which followed the late Civil War.' At the same time Mr. Justice Harlan, on behalf of himself and Mr. Justice Brewer, said: 'I fully concur with Mr. Justice Field, that since the adoption of the Fourteenth Amendment, no one of the fundamental rights of life, liberty or property, recognized and guaranteed by the Constitution of the United States, can be denied or abridged by a State in respect to any person within its jurisdiction. These rights are, principally, enumerated in the earlier amendments of the Constitution. They were deemed so vital to the safety and security of the people, that the absence from the Constitution, adopted by the Convention of 1787, of express guarantees of them, came very near defeating the acceptance of that instrument by the requisite number of states.' In the Kemmler case, which went up from the New York Court of Appeals and involved the constitutionality of the law providing for the execution of condemned murderers by electricity, the validity of which was challenged on the ground that it inflicted a cruel and unusual punishment, Chief Justice Fuller intimated that it was not and could not be contended that the Eighth Amendment applied to the States. An examination of the record in the Kemmler case and in the other cases which suggest

that the first eight amendments are not applicable to the States since the adoption of the Fourteenth Amendment, will show that the real point was either not made or was inadequately presented, and that the cases turned principally upon the construction of the requirement of due process of law. Of course, before the adoption of the Fourteenth Amendment, it was well settled that the eight amendments applied to the national government alone.

"In the famous case of Hurtado v. California, decided in 1884, the privilege and immunity conferred by the Fifth Amendment—i. e., presentment or indictment by a grand jury in a capital case—was merely mentioned in the assignment of errors, and the constitutional point we are now considering was not even argued in the brief of counsel, and was not even mentioned in the opinion of Mr. Justice Matthews. This Hurtado case was a prosecution for murder under a California statute which authorized the institution of such proceedings by information and without any presentment or indictment by a grand jury. The dissenting opinion of Mr. Justice Harlan would probably have prevailed if the clear intention of the framers of the Fourteenth Amendment had been called to the attention of the Court; but the dissenting opinion also was devoted entirely to construing the meaning and scope of the phrase 'due process of law' without reference to the Fifth Amendment.

"It is impracticable to do more at this time than to suggest the point. A full statement of the argument on either side would require very much more time than we can possibly give to its consideration during the course of these lectures. It is, however, important to bear in mind that this great question

has yet to be squarely decided by the Supreme Court in some case properly raising the point and fully presenting it in connection with the intention of the framers of the Fourteenth Amendment. To this intention of the framers, as evidenced by the extracts which have been read to you, not the slightest reference has heretofore been made in any case, so far as I can ascertain. When the proper case arises, the question ought to be treated as still open, and we may hope that the inestimable and priceless individual rights guaranteed by the first eight amendments will, in the main at least, be held to be beyond the power of any state to abridge or deny. There are many of these rights which the provision 'due process of law' does not include."

See the argument of Mr. J. Randolph Tucker in Spies v. Illinois, 123, U. S., p. 151, referred to by Mr. Guthrie, where Mr. Tucker took the position that though originally the first ten amendments were adopted as limitations on Federal power, yet in so far as they secure and recognize fundamental rights, common law rights, of the man; they make them privileges and immunities of the man as a citizen of the United States, and cannot now be abridged by a State under the Fourteenth Amendment. In other words, while the ten amendments, as limitations on power, only apply to the Federal government, and not to the states, yet in so far as they declare or recognize rights of persons, these rights are theirs, as citizens of the United States.

"It is never to be forgotten that, in the construction of the language of the Constitution here relied upon, as indeed in all other instances where construction becomes necessary, we are to place ourselves as nearly as possible in the condition of the men who framed that instrument."

Mr. Justice Miller in Ex parte Bain, 121 U.S., 1, 12.

The consideration by the Senate of the United States, as in Committee of the Whole, of the proposed Fourteenth Amendment, is found in the Congressional Globe, p. 2764, May 23, 1866, 1st Session, 39th Congress, part 3.

Senator Howard, in presenting the report of the the Committee of Fifteen on Reconstruction to the Senate, used this explicit language in reporting the amendment for the Committee in the form in which we now have it, so far as the clause under consideration is concerned:

"Now, sir, here is a mass of privileges, immunities and rights, some of them secured by the Second Section of the Fourth Article of the Constitution, which I have recited, some by the first eight amendments of the Constitution; and it is a fact well worthy of attention, that the course of decision of our courts, and the present settled doctrine is, that all these immunities, privileges and rights, thus guaranteed by the Constitution, or recognized by it, are secured to the citizen solely as a citizen of the United States, and as a party in their courts. They do not operate in the slightest degree as a restraint or prohibition upon state legislation. States are not affected by them, and it has been repeatedly held that the restriction contained in the Constitution against the taking of private property for public use without just compensation is not a restriction upon state legislation, but applies only to the legislation of Congress.

"Now, sir, there is no power given in the Constitution to enforce and to carry out any of these guarantees. They are not powers granted by the Constitution to Congress, and of course do not come within the sweeping clause of the Constitution authorizing Congress to pass all laws necessary and proper for carrying out the foregoing or granted

powers, but they stand simply as a bill of rights in the Constitution, without power on the part of Congress to give them full effect; while at the same time the states are not restrained from violating the principles embraced in them except by their own local constitutions, which may be altered from year to year.

"The great object of the first section of this amendment is, therefore, to restrain the power of the states and compel them at all times to respect those great fundamental guarantees." * * *

"As I have already remarked, Section I. is a restriction upon the States. * * * *

"I look upon the first section, taken in connection with the fifth, as very important. It will, if adopted by the states, forever disable every one of them from pas-ing laws trenching upon those fundamental rights and privileges which pertain to citizens of the United States, and to all persons who may happen to be within their jurisdiction."

Thus we have the clear expression of the framers of the amendment, openly made, and which was before the eyes of the legislators of the different state legislatures upon the ratification of the amendments by the states, that "*The great object of the first section is to restrain the power of the states and compel them at all times to respect these great fundamental guarantees*," and we find that the "fundamental guarantees" referred to were, among others, those mentioned in the first eight amendments of the Constitution. And Senator Howard called to the attention of the Senate, as a thing "well worthy of attention," that this court had theretofore decided that all the immunities guaranteed or recognized by the Constitution and its amendments were secured to the citizen solely as a citizen of he

United States, and as a party in the courts of the United States; and that they did not operate in the slightest degree as a restraint or prohibition upon state legislation. What did the Senator, speaking for his Committee intend to place before his colleagues and the country when he used the phrase "Well worthy of attention?" His words were well considered, and he was speaking directly and closely to the question. Did he not plainly say that the situation was one to be attended to for the purpose of being changed by the adoption of the amendment as reported by him? Why was the situation "well worthy of attention," if it was the intention of the framers that the amendment should not affect it? Did he not plainly imply, if indeed he did not expressly state, that the intention of the framers of the amendment, and the design of the amendment itself, was to change the existing condition, and to thus forever disable the states from passing laws trenching upon those fundamental rights and privileges which pertain to citizens of the United States?

It should be borne in mind that Senator Howard was not making a "speech." His remarks were in explanation of the meaning of the terms of the amendment, and an exposition of the intention of the framers of it in committee. He was not arguing any question one way or the other. Therefore, his report is authoritative on the question of the intention of the framers.

The genesis of the first section of the Fourteenth Amendment is instructive as showing that it was constructed out of a demand for protection to all "citizens" of a state as well as of the United States, and to all "persons." Several attempts had been made to secure an amendment to the Constitution relative to the equality of citizens before the law.

The first of these propositions, introduced in the House by Mr. Stevens, of Pennsylvania, December 5, 1865, provided that "all national and state laws shall be equally applicable to every citizen, and no discrimination shall be made on account of race or color" (House Res. 1, 39th Congress, 1st session). The next day Mr. Bingham, of Ohio, offered a resolution to amend the Constitution so as "to empower Congress to pass all necessary and proper laws to secure to all persons in every state of the Union equal protection in their rights, life, liberty and property" (Globe, 39th Cong., 1st sess., p. 14). Both of these resolutions were referred to the Committee on the Judiciary. Within a few days two other amendments of similar purport were introduced (Globe, p. 18). Senator Brown, of Missouri, submitted, February 1, 1866, a motion, which was passed, directing the Committee on Reconstruction to inquire into the expediency of amending the Constitution so as to declare with greater certainty the power of Congress to enforce and determine by appropriate legislation all the guarantees contained in that instrument, especially as to that which assured to citizens of each state the privileges and immunities of other states (Globe, p. 566). Mr. Williams suggested an amendment empowering Congress to enforce "all obligations, prohibitions, or disabilities" imposed by the Constitution on the several states (Globe, p. 645). A few days later, the Committee on Reconstruction reported in each branch of Congress a proposed amendment declaring that "the Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each state all the privileges and immunities of citizens in the several states; and to all persons in the several states equal protection in the rights of life, liberty and property" (House Journal, pp. 267, 333, 796; Senate Journal,

p. 152). A resolution reported to the House April 30, 1866, which became the basis of the Fourteenth Amendment, contained in the first section a provision that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens; nor deprive any person of life, liberty or property without due process of law; nor deny to any person the equal protection of the laws." This amendment passed the House without change. On May 30th, Senator Howard, of Michigan, in behalf of the Senate members of the Joint Committee on Reconstruction, presented a series of resolutions which had been adopted by the Republican caucus as a substitute for the House amendment, and the substitute was accepted. The first change thus introduced was to preface these words to the first section of the amendment: "All persons born in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the states wherein they reside."

New Jersey ratified the Fourteenth Amendment in 1866. In 1868 it endeavored to withdraw its ratification. Congress, however, included New Jersey in the list of ratifying states, and the attempted withdrawal was treated as null and void. The resolution of withdrawal of the New Jersey Legislature gave, among other reasons for the action, this,—that the amendment "prohibits the states from passing laws interdicting the execution of such parts of the common law as the national judiciary shall deem inconsistent with the vague provisions of the amendment; it brings state and common law, relating to life, liberty, and property, within the jurisdiction of Federal tribunals."

See, New Jersey as a Colony and as a State, Lee, Vol. 4, p. 102.

This was the understanding of the New Jersey

Legislature of 1868. That body understood that the amendment related to the citizens of New Jersey. Although adopted after the ratification, yet the expression is valuable as showing a contemporary construction of the amendment by the people of the state of New Jersey through their legislature, through whom alone they could speak on such a question. Their legislature was their only voice in reference to the ratification or rejection of an amendment to the Federal Constitution, under the method of amending that instrument as provided therein, and as provided by Congress in this instance.

A strong argument for the plaintiffs in error is found in the dissenting opinion of Mr. Justice Harlan, in the case of Maxwell v. Dow, 176 U. S., 605 (1899). He refers to his dissenting opinion in Hurtado v. California, 110 U. S., 516, and adds that he adheres to the views there expressed to the effect that no tribunal or court, Federal or state, could legally try a citizen of the United States for an infamous crime otherwise than on the indictment or presentment of a grand jury. The question in the Maxwell case was whether the trial of an accused person by eight jurors is forbidden by the Constitution of the United States; and the opinion of Mr. Justice Harlan distinctly is that, "The right to be tried when charged with crime by a jury of twelve persons is placed by the Constitution upon the same basis as the other rights specified in the first ten amendments. And while those amendments originally limited only the powers of the National Government in respect of the privileges and immunities specified therein, since the adoption of the Fourteenth Amendment those privileges and immunities are guarded against infringement by the states."

This opinion of Mr. Justice Harlan expresses the

understanding of the ordinary American citizen, who is unfamiliar with the majority opinion of this Court somewhat to the contrary. It may be safely said that the boys at school in New Jersey, when studying the political history of this country and the relations of the Federal Government to the states and the rights of citizens of the United States who are also citizens of New Jersey, are taught that such citizens are guaranteed in the enjoyment and protection of the privileges and the immunities contained in the National Bill of Rights against any infringement thereof by the states.

The effect of the Fourteenth Amendment was that "the position of the United States is changed from that of a passive non-infringer of individual liberty to that of an active defender of the same against the states."

> Burgess, Pol. Science and Consti. Law, 1, p. 185.

Professor Burgess, in the very preface to his book on Reconstruction and the Constitution, 1866-1876, states that by the Fourteenth Amendment "civil liberty was nationalized, and placed under the protection of the Constitution and the national judiciary."

In the case of Adams v. People, 192 U. S., 589, the State contended that the Fourth and the Fifth Amendments did not *ex proprio vigore* operate as limitations upon the powers of the several states, and that nothing therein contained would affect the validity of a state statute compelling a person to be a witness against himself in a criminal case, or avowedly authorizing searches and seizures, citing Thorington v. Montgomery, 147 U. S., 490; Brown v. N. J., 175 U. S., 721, and Maxwell v. Dow, 176 U. S., 581. The court, in answer to this

contention, said that the facts of the case did not raise a Federal question calling for the determination of the point raised, and whether a state could or could not do the things contended for on the part of the state **was expressly left open by the opinion to be decided whenever a proper case presented it to the court.**

Mr. Justice Day said:

"I do not feel called upon to discuss the contention that the Fourteenth Amendment has made the provisions of the Fourth and Fifth Amendments to the Constitution of the United States so far as they relate to the rights of the people to be secure against unreasonable searches and seizures, and protect them against being compelled to testify in a a criminal case against themselves, privileges and immunities of citizens of the United States of which they may not be deprived by the action of the states. An examination of this record convinces us that there has been no violation of these constitutional restrictions, either in an unreasonable search or seizure or in compelling the plaintiff in error to testify against himself."

The Court then proceeded, by an examination of of the case, to establish the fact that the things complained of by the plaintiff in error would be constitutional even under the Fifth Amendment; and so **the contention propounded by the state that it could constitutionally compel a defendant to testify against himself was not involved, and a ruling upon it unnecessary to the decision of the case.** The opinion is, *in effect*, an announcement that the Court will not decide that question until it is squarely and properly brought before it and necessary for a decision.

See the dissenting opinion of Mr. Justice Field, in O'Neil v. Vermont, 144 U. S., 363 :—

"While, therefore, the ten amendments, as limitations on power, and, so far as they accomplish their purpose and find their fruition in such limitations, are applicable only to the Federal government and not to the states, yet, so far as they declare or recognize the rights of persons, they are rights belonging to them as citizens of the United States under the Constitution; and the Fourteenth Amendment, as to all such rights, places a limit upon state power by ordaining that no state shall make or enforce any law which shall abridge them. * * * The state cannot compel a citizen to be a witness against himself in a criminal prosecution."

"I fully concur with Mr. Justice Field that, since the adoption of the Fourteenth Amendment, no one of the fundamental rights of life, liberty, or property, recognized and guaranteed by the Constitution of the United States, can be denied or abridged by a state in respect to any person within its jurisdiction. These rights are, principally enumerated in the earlier amendments of the Constitution."

Ibid. dissenting opinion of Mr. Justice Harlan, concurred in by Mr. Justice Brewer.

Granted that there is a fundamental right in question, if there has been a violation thereof, redress must come in some way; and redress has been refused by the state. There is no question as to any statute of New Jersey being held constitutional by the courts of New Jersey, as to which this court would be foreclosed,—nor even any controversy as to the meaning of a statute. The New Jersey statute cannot be complained of, nor is the

constitution of New Jersey in question. The highest court of New Jersey has declared that no defendant in a criminal case can be compelled to testify against himself; that this is "common law doctrine," which is in full force and unimpaired in New Jersey. And yet in this case the plaintiff in error, Cornell, was compelled to testify against himself. Where can he obtain redress, if not in this court? A fundamental right of his has been violated. Is he remediless? No mere matter of procedure is involved. While it is true that a state has full control over the procedure in its courts, both in civil and criminal cases, that is so subject to the qualification that such procedure must not work a denial of fundamental rights, or conflict with specific and applicable provisions of the Federal Constitution. (See cases cited at p. 175, Brown v. N. J., 175 U. S.)

I conceive that there is now definitely presented to this court a violation of a fundamental right, and of a privilege and an immunity guaranteed by the Federal Constitution, which right, privilege and immunity, if not protected by this court, are unprotected, and a citizen of the United States and of New Jersey is prejudiced by the violation by the loss of his liberty.

Plaintiff in error Cornell refers to the brief to be filed on behalf of plaintiff in error Twining, and claims the benefit of the contentions that may be made therein, as far as they may be applicable, as though the same were here repeated.

MARSHALL VAN WINKLE,
Attorney of Plaintiff in Error Cornell.

# SUPREME COURT OF THE UNITED STATES.

Supreme Court, U. S.
FILED
MAR 11 1908
JAMES H. McKENNEY,
Clerk.

## OCTOBER TERM, 1907.

No. 10

ALBERT C. TWINING AND DAVID C. CORNELL,
*Plaintiffs in Error.*

*vs.*

THE STATE OF NEW JERSEY.

In Error to the Court of Error and Appeals of the State of New Jersey.

# Brief for State of New Jersey.

H. M. NEVIUS,
*Prosecutor of Pleas.*

ROBERT H. McCARTER,
*Attorney-General, New Jersey.*

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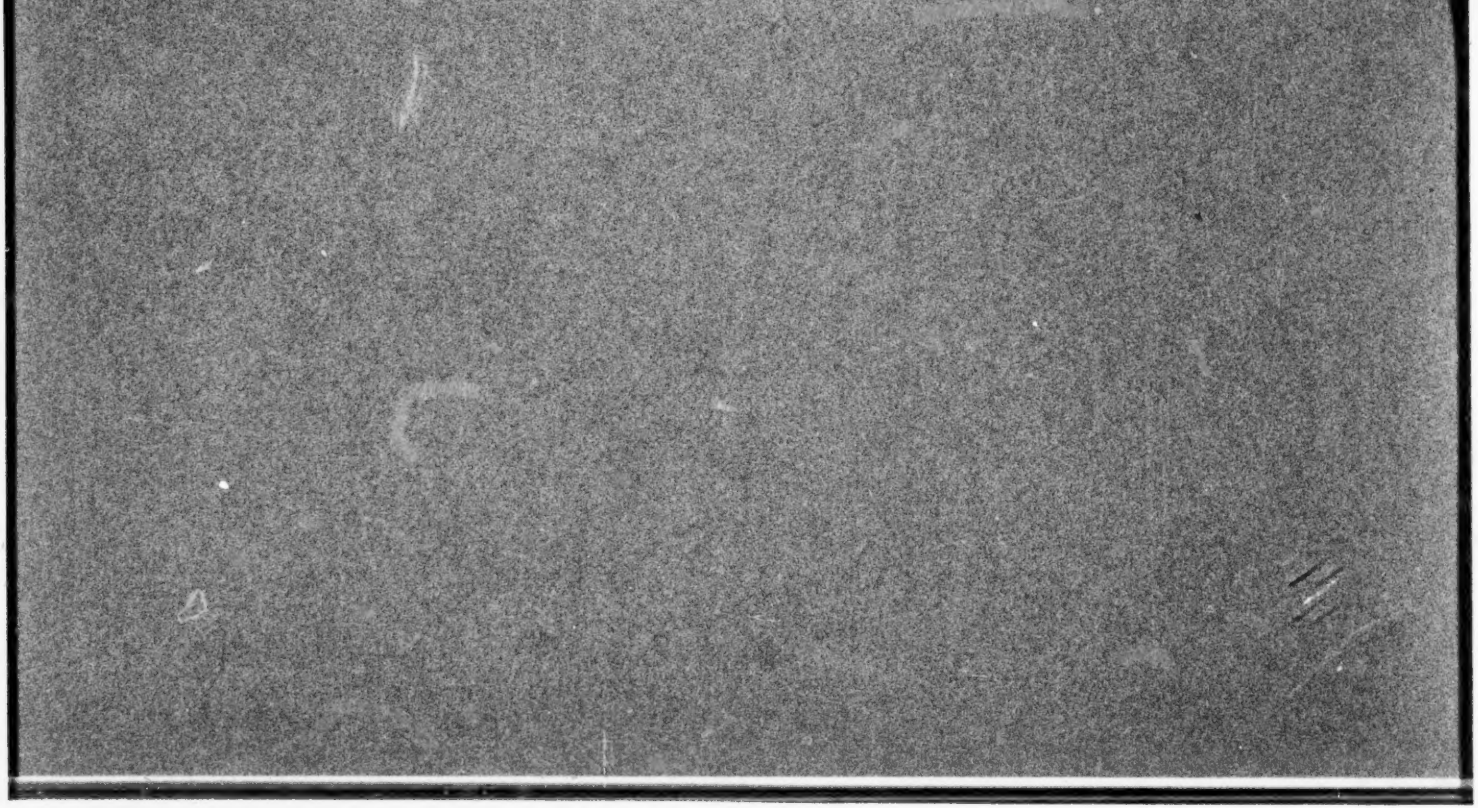

# United States Supreme Court.

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ALBERT C. TWINING AND DAVID C. CORNELL,
*Plaintiffs in Error,*
*vs.*
THE STATE OF NEW JERSEY,
*Defendant in Error.*

**On Indictment for Exhibiting a False Paper to Bank Examiner.**

**Error from the Court of Errors and Appeals, New Jersey.**

The defendants, Albert C. Twining was the president and David C. Cornell was the treasurer, of the Monmouth Trust and Safe Deposit Company. The defendants were indicted jointly for exhibiting a certain false paper to Larue Vredenberg, who was a person authorized by law to examine as to such Company, in violation of the 17th section of an act relating to Trust Companies, Pamphlet Laws of 1899, page 461, which section reads as follows:

"Every director, officer, agent or clerk of any trust company who wilfully and knowingly subscribes or makes any false statement of facts, or false entries in the books of such trust company, or knowingly subscribes or exhibits any paper, with intent to deceive any person authorized to examine as to the

condition of such trust company, or wilfully and knowingly subscribes to or makes any false report, shall be guilty of a high misdemeanor and punished accordingly."

The indictment in the same count charges the defendants with the embezzlement of the sum of $30,000 of the funds of the association. This charge is placed in the count of the indictment simply to show the reason or cause of the false paper exhibited as alleged.

The Prosecutor in this case stated to the court and jury that that was the purpose for which the charge was made and that in the trial of the cause he did not intend to charge embezzlement or to prove embezzlement, but to charge the defendants with exhibiting a false paper to a person authorized by law to examine into the condition of the said trust company.

The commissioner of banking and insurance exists by virtue of the statute, entitled banking and insurance department, general statutes, page 137.

The commissioner of banking and insurance, his deputy or by such person or persons as they may designate, have full power to examine into the condition of surety and safe deposit companies See general statutes, page 3,257, section 42, as follows:

"That the bank commissioners shall have authority themselves or by such person or persons as they may designate, to examine the affairs of any such corporation whenever they may deem it expedient, and it shall be the duty of the officers and employees of such corporation to exhibit its books, securities, records and accounts for such examination, and to otherwise facilitate the same so far as it may be in their power to do and the bank commissioners, or any examiner appointed by them, shall have the power to examine, under oath or affirmation, the officers and employees of any such corporation, relating to its business and affairs, and

for that purpose any such examiner shall have power to administer oaths and affirmations."

The commissioner of banking and insurance, his deputy or any examiner appointed by him, is authorized to examine into the condition of trust companies. See pamphlet laws of 1899, page 462, section 21, viz.:

"Every trust company shall be subject to the inspection and supervision of the commissioner of banking and insurance, and it shall be the duty of said commissioner either personally or by some person or persons to be appointed by him whenever he shall deem it expedient, or at the request of any such trust company to examine any such trust company, and it shall be the duty of the officers and employees of such trust company to exhibit its books, securities, records and accounts to the person or persons authorized by said commissioner of banking and insurance to conduct the examination and otherwise to facilitate the same so far as it may be in their power; and the said commissioner of banking and insurance, or any examiner appointed by him, shall have power to examine under oath or affirmation the directors, officers and employees of any such trust company relative to its business and affairs, and for that purpose any such examiner shall have power to administer oaths and affirmations."

Mr. Vredenberg, the examiner, was appointed some years ago by Mr. Bettle, the commissioner of banking and insurance, as an examiner authorized to examine saving banks, state banks and trust companies.

See evidence, page 33.

As appears from the evidence Mr. Vredenberg had been such examiner and did examine the condition of the Monmouth Trust and Safe Deposit Company's books previously, and in February, 1903,

he was directed by Thomas K. Johnston, deputy, commissioner of banking and insurance and acting as the commissioner at that time, during the sickness of Mr. Bettle; the commissioner directed him to go to Asbury Park and to examine into the condition of the Monmouth Trust and Safe Deposit Company.

See evidence, page 34.

The deputy commissioner of banking and insurance has such power. See general statutes, page 137, section 4, as follows:

"That the said commissioner shall have authority to appoint with the consent of the governor, a deputy, who shall have power to perform all the duties of the commissioner in case of his absence or inability to act from any cause; said deputy shall be commissioned by the governor, and before entering upon his duties shall execute a bond in the sum of ten thousand dollars, with two sufficient sureties, freeholders of this state, to be conditioned and approved in the same manner as the commissioner; he shall also take an oath of office in the same manner as the commissioner, which bond and oath shall be filed in the department of state."

Mr. Vredenberg went to the office of the Mon mouth Trust and Safe Deposit Company at Asbury Park on the 14th day of February, 1903. He found the institution closed with a notice upon the front door, that the institution was closed temporarily. He entered by the back door and found Mr. Twining, the president, Mr. Cornell, the treasurer, and the clerks of the institution there and he stated to Mr. Twining and Mr. Cornell the object of his visit.

See evidence, pages 30 to 35.

I now offer in evidence the certificate of incorporation, evidential under the 3d section of trust company act.

See case, page 24, line 22; and page 26, line 12.

The foregoing are the statutes relating to the commissioner of banking and insurance and his powers and duties, the appointment of a deputy commissioner with his powers and duties, and the appointment of an examiner for the purpose of examining trust and safe deposit companies, the appointment of Larue Vredenberg as such examiner, his orders to examine the Monmouth Trust and Safe Deposit Company in February, 1903; the portion of the statute entitled, "An Act concerning Trust Companies," Pamphlet Laws of 1899, and particularly section 17, for the violation of which section and its provisions the defendants are indicted in this case, and the offer of the certificate of incorporation, without objection, line 21, page 24, printed case.

The defendants are indicted for the exhibiting of a false paper in violation of the 17th section of an act concerning trust companies, laws of 1899, page 450.

The charge in the indictment for the embezzlement of the sum of $30,000 is simply in the count of the indictment to show the inducement for the exhibiting of the aforesaid false paper, and there was not any evidence offered or intended to be offered that the defendants or either of them had embezzled the sum of $30,000 or any other sum.

Objection was made to the indictment on the ground that the defendants could not or should not have been indicted jointly.

A careful reading of the evidence and to which I call your attention later on, shows clearly that the exhibiting of the false paper was the joint act of the defendants.

Another objection made to the indictment was that the exhibiting of the false minutes was not a crime under the laws of the State of New Jersey,

prior to 1899, but that it was created a crime by an act of 1899 under the act concerning trust companies, and that the indictment did not allege that this is a trust company, created under that act, and that this statute was made and can only apply to trust companies created under that act.

My answer to that objection is that the act of 1899 is an act concerning trust companies and that section 17 of that act applies to all trust companies at that time and still existing.

Mr. Vredenberg found in a cash book, called number 8 of the Monmouth Trust and Safe Deposit Company, on pages 110 and 111, certain entries, made and purporting to have been made on the 13th day of February, 1903, that being the date upon which the Trust Company closed its doors. See Vredenberg's testimony, page 36, beginning with line 8:

Q. In the course of your examination, did you come across a book called cash book number 8 of the Monmouth Trust and Safe Deposit Company?

A. I did.

Q. Is this the book?

A. It is.

THE PROSECUTOR.

I will have this book marked for identification, "State's Exhibit No. 3."

Q. Did you find anything in that book showing the last entry of business transacted by the company and the date when it was done?

A. Yes, I looked over—(interrupted by objections).

Q. Was your attention directed in any way to the entries on pages 110 and 111 of this exhibit?

A. (Page 37.) Yes, sir.

Q. Who called your attention to that, if you remember, to pages 110 and 111?

A. No one; I found that among the assets.

Q. Did you call the attention of either or both the defendants to the entries of pages 110 and 111 of that book?

A. To some of the entries.

Q. What credit and what debit did you ask the question about?

Objection.

BY THE COURT: (Page 38)

Was anybody present when you had your conversation with Twining?

A. Yes.

BY THE COURT:

Q Who?

A Miss Rittenhouse and Mr. McMurtrie.

BY THE COURT:

Q What about Mr. Cornell, was he present or not?

A. He was present; yes, he was present.

BY THE COURT: (Page 40.)

Q. What did Mr. Cornell say?

A. I asked Mr. Cornell for an explanation of this debit.

BY THE COURT:

Q. On what page?

A. On page 111.

Objections.

Q. What debit are you referring to?

A. This charge to stock and bond account of

381 shares of First national bank of Asbury Park stock; the charge is for $44,875. I asked for an explanation of that charge and will I give you his phraseology as he explained, that it was a purchase made that date.

Q. What date?

A. The date under which the entry is made.

Q. What date is that?

A. February 13th.

Q. 1903?

A. 1903.

Q. (Page 42, line 23.) I have called your attention and endeavored to find out any statement that Mr. Cornell made at this time to the entries on pages 110 and 111?

A. Yes, sir.

Q. What did he say about those entries, if you can recollect?

A. What he said to me had to do with it as incorporated in his statement and it was that the stock was bought by the trust company that day and it was bought in pursuance of authority of the board of directors, and I also inquired how it was paid for.

Q. (Page 48, line 6.) In the course of your examination did you find anything relating to the paper in relation to the entries on pages 110 and 111?

A. I did.

Q. What did you find?

A. I found what I was told was the--

Objection.

Q. By whom were you told?

A. Told by Mr. Cornell, I think first by Mr. Cornell.

THE WITNESS:

I found this paper (producing).

THE PROSECUTOR:

I will have this paper marked for identification.

(The said paper is marked for indentification, "State's No. 7.")

Q. Did you have any conversation with either of the defendants or both of them in regards to this exhibit?

A. I did.

Q. (Page 49, line 8.) Did you have any further conversation with them, or how did you find this paper, exhibit 7?

A. On Saturday, the 14th.

BY THE COURT:

Q Where, under what circumstances, Mr. Prosecutor, did he find it? Who was present?

A. I asked for the authority under which this stock was purchased

BY THE COURT:

Q. You asked who? Mr. Twining?

A. Yes, and Mr. Cornell, and he told me that it had been purchased by authority of the board of directors. I then asked for the minute book and the minute book was handed down to me.

Q. By whom? Well, was Mr. Cornell there when you got it?

Objections.

BY THE COURT:

What is the question?

Q. By whom was the minute book handed down to you and who was present when it was handed down to you.

A. I don't think anybody was present but Mr. Cornell. I think he handed it to me. He handed it to me or I took it myself in his presence and he called my attention to the fact that the last minutes were not written in the book and showed me this paper, exhibit 7, as being the minutes of the last meeting which had not yet been transcribed into the book.

Q. (Page 50, line 4.) Did you have any further conversation or did you receive any further document or paper in regards to this transaction on pages 110 and 111 or in regards to either of them or the minutes from either Mr. Twining or Mr Cornell?

A I received no paper from either of them; I think, yes, there was one, after this conversation of the 16th.

Q. When did you receive it and whom did you receive it from?

A. On the 16th of February, I received jointly from the two defendants what they called the corrected minutes. This conversation which I spoke of in regard to a correction of a name in Mr. Cornell's statement led them both to say that the minutes were mistaken in regard to the presence of one of the directors stated therein to have been present and thereupon these corrected minutes were written changing that name. (Producing paper.)

THE PROSECUTOR:

I will have this paper marked for identification and it is marked "State's, number 8."

BY THE COURT: (Page 68, line 14.)

You have said that somebody told you that the minutes of the particular meeting in question had not been written up and that they

were on a loose paper in the book; do you recollect who it was told you that?

A. I cannot say definitely that Mr. Twining said so on Saturday. He did say so on Monday, both of them.

*Cross-examination* OF MR. VREDENBERG BY MR HAWKINS (Page 64, line 33.)

Q. What did you say, Mr. Vredenberg, as to the circumstances under which you found Exhibit 7, the minutes?

A. Well, of course, I can only state the best of my recollection. I asked for the authority to purchase the stock and I was told that it had been purchased by authority of the Board of Directors and I therefore asked for the—and my recollection is that I asked Mr. Cornell for it, and the book, I think, lay on Mr. Twining's desk, in his little room on the top of the desk, that is my recollection, and the paper was flat in the book, and it was mentioned to me as a loose paper, being the minutes of the meeting. The conversation at that time was not continued much in the way of inquiry as to the meeting itself. I feel very confident that I asked Mr Twining whether those were the minutes, but I could not be absolutely certain that that was on Saturday or on Monday.

Q. (Page 65.) When you went into Mr. Twining's room and found this book lying on the desk, who took the book? What was done with the book?

A. My recollection is that Mr. Cornell took the book down and handed it to me. I was right at his elbow.

Q Then what did you do?

A. Then there I looked at this paper.

Q. You looked at what paper?

A. The loose paper which was said to be the minutes of the last meeting, and after seeing it, I took it in my own possession, I think I put it in my pocket.

Q. And you asked what that paper was?

A. Well, I was either told without asking or told after asking—one or the other.

Q. You either found the paper itself and asked what the paper was, or you were told what the paper was without asking?

A. Yes, it was one or the other; my recollection is that when I asked for the authority under which the stock was purchased, I was told it was purchased by authority of the Board of Directors; and when I asked for the minutes showing that authority, I was referred to this book, and the loose piece of paper in it was mentioned as being the minutes not yet transcribed in the book itself.

TESTIMONY OF ANNIE RITTENHOUSE:

(Page 69, line 16, Case.)

Q I show you a paper marked No 7, and ask you if you know who wrote that document?

A. Well, I cannot say who wrote it, it was written on the typewriter; I presume that I wrote it.

Q. Do you remember whether it was dictated to you by anyone at that time or not, and if so, by whom?

Objections.

BY THE COURT:

Have you ever read that paper before, Miss Rittenhouse?

A. I have; yes, sir.

BY THE COURT:

(Page 70, line 5.) Do you recollect of ever writing it?

A. Yes, I must have written it; I remember this, I must have written it.
Q. How did you come to write it?
A. Well, it was dictated to me.
Q. By whom?
A. By Mr. Twining.
Q. Mr. Albert C. Twining?
A. Yes, sir.

The following is a copy of Exhibit No. 7:

MONMOUTH TRUST AND SAFE DEPOSIT COMPANY,
Asbury Park, N. J.

A special meeting of the board of directors of this company was held at the office of the company on Monday, February 9th, 1903.

There were present the following directors:

| | |
|---|---|
| George F. Kroehl, | G. B. M. Harvey, |
| S. A. Patterson, | A. C. Twining. |

The minutes of the regular meeting held January 15th, 1903, were read and on motion duly approved.

All loans taken since the last meeting were gone over carefully and upon motion duly seconded, were unanimously approved.

A resolution that this company buy three hundred and eighty-one shares of the stock of the First national bank at $44,875 was adopted.

On motion the meeting adjourned.

This is the false paper which the defendants are charged with having exhibited to Larue Vreden-

berg, the bank examiner, on the 14th day of February, 1903 The above testimony goes to show first, that the minutes were dictated to Annie Rittenhouse by the defendant Twining, and that on the 14th day of February, 1903, the day that the Monmouth Trust and Safe Deposit Company had closed its doors, it was found in the minute book of the said Trust and Safe Deposit Company and was handed to Mr. Vredenberg, the examiner, by the defendant Cornell as the minutes of the last meeting of the board of directors purporting to have been held on the 9th day of February, 1903, and that they had not yet been transcribed into the minute book, but were placed there.

The evidence shows clearly that the bank examiner, a few minutes after he had arrived at the bank on the 14th day of February and stated his errand to the defendants Twining and Cornell, the president and treasurer of the said Trust and Safe Deposit Company, whom he found in the institution and who knew him from his previous visits there in his capacity as bank examiner, did allow him to take possession of the books and papers of the institution in the examination made by him, on pages 110 and 111 of the cash book, number 8, marked exhibit No. 3 in this case, called the attention of both Twining and Cornell to those items which were a transaction purporting to have taken place on the 13th day of February, 1903, the very day on which the said Trust and Safe Deposit Company closed its doors; and asked both of the defendants, as appears by the foregoing testimony, by what authority they had purchased the stock mentioned, and that they or one of them in the presence of both said, it was purchased by authority of the board of directors by resolution, and that he then called for the minute book and as appears by the foregoing testimony, the minute book was produced and the loose paper, Exhibit No. 7, was represented to be the resolution of the board of direc-

tors of the meeting of February 9th, 1903, and not yet transcribed in the minute book; and that both the defendants on that day, namely the 14th, and on the following day, the 16th, stated that they were the minutes of that meeting The question now is, was this paper exhibited by the defendants to Mr. Vredenberg, the bank examiner? After reading the foregoing testimony there cannot be any doubt upon that point. The contention of the defendants' counsel at the trial and also the argument for the rule for a new trial is that the paper to be exhibited must be actually handed by them to Mr. Vredenberg.

The point is that they were actually handed to Mr. Vredenberg by Mr. Cornell, or pointed out to him as the minutes of the last meeting of the board of directors of the said Trust and Safe Deposit Company. The actual fact is that they were dictated by the defendant Twining to Miss Rittenhouse, the stenographer of the said Trust & Safe Deposit Company, and that being so, he must have had knowledge of their existence. The testimony of Mr. Vredenberg is clear and concise upon this one point, that when he inquired of the defendants Twining and Cornell for the authority by which they had purchased the said stock, that the reply was, both being present, that it was by resolution of the board of directors of the said Trust & Safe Deposit Company.

My contention is that when Mr. Vrendberg went to the said Trust & Safe Deposit Company's building on the 14th day of February in his official capacity and stated the object of his coming to the defendants, that when they turned over to him the books and papers, etc., of the said Trust & Safe Deposit Company, they made an exhibit to him of every book and paper in that institution relating to its business.

By section 21 of an act concerning trust companies, Pamphlet Laws of 1899, page 462, every

trust company shall be subject to the inspection and supervision of the Commissioner of Banking and Insurance, and it shall be the duty of the said commissioner, either personally or by some person or persons appointed by him, whenever he shall deem it necessary, or at the request of any said trust company, to examine any trust company, and it shall be the duty of the officers and employees of said trust company to exhibit its books, securities, records and accounts to the person or persons authorized by said Commissioner of Banking and Insurance to conduct the examination, otherwise to facilitate the same so far as it may be in their power, etc. By this statute it was the duty not only of the officers but the employees of the bank to do just what they did do and exhibit when called upon to exhibit the authority for the entries inquired about on pages 110 and 111 on Cash Book No. 8, Exhibit No. 3 in this case. The proof is clear and conclusive that Twining prepared or dictated the false minutes, viz.: Exhibit No. 7, and had them left in the minute book to be exhibited in case of need and Cornell knew they were there and exhibited them to the examiner and both the defendants, Twining and Cornell, both on the 14th and 16th of February, spoke of the minutes, viz.: Exhibit No. 7, as the resolution of the board of directors of the Monmouth Trust & Safe Deposit Company, as the resolution and authority for the entries made upon pages 110 and 111 of Cash Book No. 8, Exhibit No. 3. It strikes me that it would be futile to attempt to argue further upon this question as to whether or not there was an exhibiting of this paper, Exhibit No. 7, by the defendants, Twining and Cornell, to Mr. Vredenberg, the examiner.

Now, was this a false paper? (Page 54, line 29, Case.)

Q. Were you present at any time when Mr.

Cornell had a conversation with any other person in regards to these so-called minutes?

A. I was.

Q Who was the person that he had the conversation with?

A. Mr. Patterson.

Q. Was anyone else present?

A. I am not sure who else was present, if anyone, then at the first conversation.

Q When was the first conversation?

A. There was a second one. It was on the 17th or 18th, I am not sure.

Q What was said by Mr. Cornell, if anything, in regards to those minutes?

A. He insisted that Mr Patterson—

Objections.

A. He said to Mr. Patterson that the statement which he had made to me to the effect that Mr. Patterson was present at that meeting was the truth.

Q. Go ahead, what else was said by either of them there in your presence?

A By either of them?

Q. That is by Patterson or Cornell?

A. (Page 55.) Mr. Patterson came in and brought Mr. Cornell into my presence and asked Mr. Cornell and me whether Mr. Cornell had made a statement to me that he, Patterson, had been present at a meeting of the Board of Directors at which a resolution of authority had been passed to purchase stock of the First national bank. I told Mr. Patterson such a statement had been made to me by Mr. Cornell.

Objections.

THE WITNESS:

Mr. Cornell said his statement to me was

true, that Mr. Patterson was present at that meeting, and that he ought to remember it. Mr. Cornell would not admit that he could have made any mistake in the statement he had made to me. Later on, perhaps half an hour, Mr. Patterson returned; at that time he had with him Mr. Hawkins, Mr. John F. Hawkins, to represent him and the conversation.

Q. Was Mr. Cornell there then?

A. Yes, sir.

Q. All right?

A. A conversation to the same effect took place again and Mr. Cornell made no change in the statement that he had made to me. Mr. Hawkins and Mr. Patterson withdrew upon Mr. Patterson's direction to Mr. Hawkins to take such steps as were necessary to protect him from the statement in question, which he said was false, that he had not been to any such meeting and had never authorized in any way the purchase of any First national bank stock.

Q. Subsequently did you hear from Mr. Cornell again in regard to that conversation?

A. Yes, subsequently a paper was handed to me.

Q. By whom?

A. I think by Mr. Hawkins; possibly by Mr. Patterson (producing paper).

Q. Is this the paper?

A. That is the paper.

THE PROSECUTOR:

I will have this paper marked for identification.

The said paper is marked "State's No. 9."

Page 75, line 32; examination of Mr. Tusting:

Q. Mr. Tusting, I believe you stated this

morning that you were a director of the Monmouth Trust and Safe Deposit Company.

A. (Page 76.) I did.

Q. For the year 1902 and 1903, as I put it; that is, up to the close of the institution in February, 1903?

A. I did

Q. You were a director at least during the months of January and February of that year, were you not?

A. I was.

Q. Were you present at any special meeting of the Board of Directors said to have been held on Monday, the 9th day of February, 1903?

A. I was not.

Q. Was you notified that there would be such a special meeting held on that day?

A. I was not.

Q. Do you know if there was such a special meeting of the Board of Directors of the trust company held on that day?

A. I know of no such meeting.

Q. Do you know if there was a resolution passed by the Board of Directors of the trust company at a special or general or regular meeting of its directors authorizing the purchase of 381 shares of stock of the First national bank of Asbury Park for $44,875.

A. I know of no such resolution.

Q. At any meeting of the Board of Directors?

A. At any meeting.

Q For the purchase of 381 shares or any number of shares?

A. Or any number of shares.

Q. At the price, $44,875, or any other price?

A. No price.

Q. (Page 78, line 22.) As secretary of the directors of this company you stated this morning, I believe, that you kept the minutes of

such meetings?

A. I said I attested them.

Q. Did you ever attest Exhibit 7?

A. One of these has my name and the other has not.

Q. Were you ever as secretary of the board of directors requested to attest this by either the president or treasurer of the company?

A. I was not requested.

Q. Were you ever notified that the minutes had been written or transcribed in this way by either of them?

A. Never.

Q. Were you aware that such minutes were in existence prior to the closing of the institution on the 13th of February?

A. No, sir.

Page 98. Testimony of Samuel Patterson:

Q. You reside at Asbury Park?

A. Yes, sir.

Q. Were you connected in any way with the Monmouth Trust and Safe Deposit Company?

A. Yes, sir.

Q. In what way?

A. I was a director.

Q. How long had you been a director?

A. About a year and a half.

Q. (Page 99.) Were you a director at the time the institution was closed in February, 1903?

A. I was.

Q. And for a year and a half previous thereto?

A. Yes, sir.

Q. As a director of the trust company did you attend any meeting of the board of directors on the 9th day of February, 1903?

A. No.

Q. Did you have any notice that any meeting, special or regular or general of the board of directors would be held on the 9th day of February, 1903?

A. I did not.

Q. Did you on the 9th day of February, 1903, or on any other day, at any meeting of the board of directors, vote for the purchase of 381 shares of stock of the First national bank of Asbury Park for the sum of $44,875?

A. No, sir.

Q (Page 100.) Did you have any conversation, Mr. Patterson, with either Mr. Twining or Mr. Cornell in regard to the matters stated in this Exhibit No. 7?

Objections. Admitted by the court.

A. I did.

Q When?

A. Why, it was the 14th of February, I think, or thereabouts, 1903.

Q. With whom; which one did you have the conversation with?

A. Mr. Cornell.

Q. What did he say about Exhibit No. 7?

A. (Page 101.) He said he thought I had been present at such a meeting.

Q. What else did he say if anything about Exhibit 7?

A. And he undertook to refresh my memory as to a meeting of that character and I did not remember it and I denied it, and we left the matter stand in that uncertain way and I had another interview with Mr. Cornell subsequent to that.

Q. How long after that?

A. Well, it was within a few minutes.

Q. Was anybody present at that subsequent interview besides yourself and Mr. Cornell?

A. Yes, sir.

Q Who?

A. Mr. Hawkins.

Q. Mr. John F. Hawkins?

A. Yes, sir.

Q. And did he give you anything in writing at that time, or execute any writing at that time?

A. Yes.

Q. Embodying that statement that you had not been present?

A. Yes.

Q. Is Exhibit No. 9 the paper that he gave you or that he executed at that time?

A. It is.

Q. Do you know when the Monmouth Trust and Safe Deposit Company closed?

A. Yes.

Q. When?

A. The 13th of February, 1903.

Q. About what time of the day?

A. Eleven o'clock.

See printed case, page 75, testimony of John F. Hawkins:

Q. I show you Exhibit No. 9 and ask you if that affidavit was subscribed and sworn to before you as master in chancery, by David C. Cornell?

A. Yes, sir.

Q. Did you make him acquainted with the contents of the same?

A. Yes. sir; I read it to him.

Q What did you do with it after it was signed?

A. I took it down and delivered it to Mr. Vredenberg.

## Exhibit No. 9.

State of New Jersey, } ss.
County of Monmouth. }

David C. Cornell, of full age, being duly sworn according to law upon his oath says that Samuel A. Patterson neither directly or indirectly at any regular meeting or special meeting or any other time, authorized, sanctioned, countenanced or knew of any intention on the part of any of the officers of the Monmouth Trust Company to purchase stock of the First national bank with money of the trust company or any other way, and that there was no general or special meeting of the board of directors of the Monmouth Trust Company held last week, and that any minutes indicating that there was such a meeting held, are incorrect; and the above statement applies in all respects to R S. Tusting as well as to Mr. Patterson.

Sworn and and subscribed to before me
this 18th day of February, 1903.

DAVID C. CORNELL.

JOHN F. HAWKINS,
M. C. C. N. J.

Both exhibits Nos. 7 and 9 were offered in evidence. From the above evidence and exhibit No. 9, there can be but on conclusion drawn as to whether or not exhibit No. 7 was a false exhibit. It was dictated by the defendant Twining to Miss Rittenhouse and placed in the minute book.

When the attention of Mr. Twining and Mr. Cornell, the defendants, was called to the entries in exhibit No. 3, they replied that they were made pursuant to a resolution of the board of directors. This answer was made by one in the presence of the other.

Mr Twining dictated those so called minutes, and Mr. Cornell insisted that they were passed, and

that Mr. Patterson, one of the directors whose name is attached thereto, was present. He insists in Mr. Patterson's presence that Mr. Patterson was mistaken and that Mr. Patterson was present at that said meeting. He insists again in the presence of Mr. Patterson and Mr. Hawkins that the minutes were correct and that Mr. Patterson was present; yet, when Mr. Patterson directed Mr. Hawkins to protect his interest in this matter, then and not until then did Mr. Cornell admit that the minutes prepared by the defendant Twining were false and made an affidavit to that fact which said affidavit is above set forth.

Is Mr. Twining bound by this affidavit? The affidavit was read and offered in evidence at the trial of the above stated cause in the court below in the presence of both the defendants; the defendant Twining being present did not and has not denied that the affidavit is a false one, therefore we must contend that the affidavit is true, from all of which fully appears that Exhibit No. 7 is a false paper.

Was this paper exhibited for the purpose of deceiving Larue Vredenberg, or such person as might be sent by the commissioner of banking and insurance to examine as to the condition of said trust company?

At the time this paper was prepared and placed in the minute book of the Monmouth Trust & Safe Deposit Company, namely on the 13th day of February, the date upon which the entries were made upon pages 110 and 111 of Cash Book No. 8, Exhibit No. 3 in this case, it must have been evident to both of the defendants, Twining and Cornell, that a bank examiner would soon make his appearance. The Monmouth Trust and Safe Deposit Company closed its doors at eleven o'clock A. M. on the 13th day of February, 1903, and Mr. Vredenberg arrived there in his official capacity at about

ten A. M on the 14th day of February, the date following. If this is so, and it appears from the evidence already recited in this brief that Mr. Vredenberg discovered the said entries about an hour after he had arrived there, and that he asked the defendants, Twining and Cornell, the authority for the said entries and was informed that it was by virtue of a resolution of the board of directors; and upon asking for the minutes, was told the resolution was on a loose paper and had not yet been transcribed into the minute book, and that a piece of paper was presented to Mr. Vredenberg as the said resolution, and is Exhibit No. 7 in this case.

While it is a fact that this paper was prepared and placed in the minute book before Mr. Vredenberg's arrival, it was placed there to be seen by the examiner, whoever he might be when he came.

This indictment was found some time afterward. Mr. Vredenberg was the examiner who was to be deceived, as stated in the indictment. Mr. Vredenberg in his testimony, page 36, case, stated that he came across a book called Cash Book No. 8 of the Monmouth Trust and Safe Deposit Company.

Q. (Page 37.) Who called your attention, if you remember, to pages 110 and 111?

A. No. one; I found that among the assets.

Q. Where did you find that book on February 14th?

A. In the counting room on the desk where the bookkeeping was being conducted.

This book, Exhibit No. 3, was one of the regular books kept by the Monmouth Trust and Safe Deposit Company. See evidence of Oliver G. Allen, page 94, case:

Q. Was you engaged by the Monmouth Trust & Safe Deposit Company?

A. I was; yes, sir.

Q. How long prior to the time the institution closed ?

A. About three years.

Q. In what capacity ?

A. As bookkeeper.

Q. Did you continue in your employment as bookkeeper up to the close of the institution ?

A. I did; yes, sir.

Q. (Page 95.) I show you a book marked No. 3 for identification and ask you if that was one of the books of the Monmouth Trust and Safe Deposit Company while you were in its employ ?

A. Yes, sir.

Q. Will you turn to pages 110 and 111 of this exhibit ?

A. (The witness does so.)

Q. I ask you in whose handwriting page 110 is, if you know ?

A. Part of it is in my handwriting, part of it in Mr. Cornell's.

Q. I call your attention to an item reading, "North American Trust Company, $35,048.77." and I ask you in whose handwriting that is ?

A. That is Mr. Cornell's.

Q. I call your attention to page 111, to the item reading, "stocks and bonds, 381 shares, 1, A. P. $44,875," and ask you in whose handwriting that is ?

Objections.

Q. In whose handwriting is it ?

A. That is in Mr. Cornell's handwriting.

Q. Was this book, No. 3, in active use up to the time the institution closed ?

A. It was; yes, sir.

Then follows some questions on cross-examination by Mr. Hawkins as to the figures 381, and whether

they did not appear as though they had been written over something else. (See Larue Vredenberg's testimony, page 96, case.)

Q. Mr. Vredenberg, are the figures at pages 111 of Exhibit 3, the figures "381," in the condition they were when this book was turned over to you at the close of this institution?

A. It is in the condition it was when I first saw the book about five minutes after I came into the institution.

Q. On what date?

A. The 14th of February, 1903.

Q. And they were still in the control of the institution when you came in there?

A. Yes, sir.

*Cross-examination* BY MR. HAWKINS.

Q. Did you say whose figures they are?

A. No.

Q. Doesn't it appear to you, Mr. Vredenberg, that these figures "381" have been written in over something else that has been erased?

A. Yes, but that erasure was made before I saw the book.

See testimony of Mr. Vredenberg, page 40, case.

Q. What did you say and what did he say?

A. I asked Mr. Cornell for—

A. I asked Mr. Cornell for an explanation of this debit.

BY THE COURT:

On what page?

A. On page 111.

Q. What debit are you referring to?

A. This charge to stock and bond account of 381 shares First National Bank of Asbury Park

stock; the charge is for $44,875. I asked for an explanation of that charge, and will I give you his phraseology as he explained, that it was a purchase made that date—

Q. What date?

A. The date under which the entry is made.

Q (Page 41.) What date is that?

A. February 13th.

Q. 1903?

A. 1903.

Here follows a series of objections as to the written statement marked Exhibit 4 which was not offered in evidence, and the contention of which however will appear later on in the testimony of Miss Rittenhouse.

Q. (Page 52.) I am asking now what did Mr. Twining say, if anything, in regards to the reason of that entry there of $35,048.22, and why it was credited to the North American Trust Company?

Objections.

A. He said that there was a loan to the North American Trust Company of about $45,000.

BY THE PROSECUTOR:

(Page 53.) I want it fully and would like to have the jury understand all the facts.

THE WITNESS:

That this loan represented money that they had borrowed in the purchase of First National Bank stock.

Q. Who had borrowed.

A. He used the expression "the purchasing pool." That is the expression which he has used in his statement, "the purchasing pool" paid about $127 per share for it.

Q. (Page 61.) Do you know if $44,875, of the trust company's money was used to pay for any of this First national stock or any part of that amount?

Objected to as irrelevant.

A. Yes, I do.

Q When was it it paid?

A. On the 19th of January, $35,000 and some dollars was paid, and on the 4th day of February, I think, it was $10,000 was paid.

Q. Both in 1903?

A. Both in 1903; yes, sir.

Q. From the funds of the trust company?

A. Yes, sir.

Q. Do you know how the $35,000 was paid on the 19th of January?

A It was paid by a draft on the trust company drawn by the North American Trust Company of New York.

Q. (Handing witness paper.) Is that the draft?

A. That is the draft.

This draft is marked for identification. "State's No. 16"

Q. Do you know how the $10,000 was paid on the 4th of February, as you say?

A. By the $5,000 checks.

Q (Page 62.) Whose checks were they?

A. Albert C. Twining's.

Page 66 and 67 of cross examination by Mr. Hawkins:

Q. You have given some testimony in regard to a note or a draft of the 19th of January for $35,000? There was $45,000 altogether, wasn't there?

A. Yes, the draft was $35,000.

Q. I have $45,000, then $35,000, and then $10,000?

A. Yes.

Q. You have undertaken to state where the proceeds of that draft went?

A. Yes, sir.

Q. To whom do you say the proceeds went?

A. To the payee of the draft.

Q. Was Mr. Cornell the payee of the draft?

A. No.

Q. He was in anywise interested in the proceeds of that draft?

A. He don't appear to be by the draft itself.

Q. Is that not also true of the $10,000?

A. As far as I know, I never saw those two checks that made up the $10,000.

Q. I understand you to say that Mr. Cornell when he told you about the purchase of the 381 shares of bank stock for $44,875 that he did not know of the transaction at the time it was made?

A. Yes, he said the draft was given to Mr. Twining in blank, that it was given to him on the date appearing on the stub, January 19th, which is the date of the draft itself, and it was not taken on the books until February 13th, because he did not know just exactly the amount of it.

Q. I understood you to say also with regard to the $35,000?

A. That is the $35,000 that I am speaking of now.

Q. You said both about the $44,875, also?

A. Yes, sir.

Q. I understood you to say about the $35,000,

that Mr. Cornell disclaimed all knowledge of the transaction to you. is that right?

A. That is right; I won't say that he disclaimed all knowledge; he disclaimed all definite knowledge.

The following is a copy of the draft referred to which was offered in evidence:

MONMOUTH TRUST AND SAFE DEPOSIT COMPANY No. 3017

Asbury Park, N. J., January 19th, 1903.

NORTH AMERICAN TRUST COMPANY,
New York City.

Pay to the order of
Yourselves $35,048.77
Thirty-five thousand forty-eight & 77-100 Dollars
(signed) DAVID C. CORNELL,
Treasurer.

It was endorsed, "North American Paid Jan. 19. 1903. Receiving Teller Trust Company." Perforated, "Paid."

From the foregoing evidence it appears conclusively that the paper exhibited was not only exhibited and was false, but that it was exhibited for the purpose of deceiving Mr. Vredenberg, the bank examiner, in this, that on pages 110 and 111 of Exhibit No. 3, in the transaction of the day on which the Monmouth Trust and Safe Deposit Company closed its doors, there appeared this entry of 381 shares of the capital stock of the First national bank of Asbury Park. It is in evidence that the Trust and Safe Deposit Company closed its doors at about eleven o'clock on said day, therefore it was only open for business on that day for about one hour. From the above evidence it appears that Mr. Twining and Mr. Cornell both stated that it was a transaction of that day and by authority, etc. It

appears from the evidence above mentioned that the stock in question was purchased on the 19th day of January, 1903, by a purchasing pool eleven days previous to the 9th day of February, when the alleged meeting was said to have taken place, and fifteen days prior to the date on which the entries were made, as to date when they were made. $35,048 77 represented by this draft drawn on the 19th day of January and paid on that date as appears by the endorsement on the back of said draft, had not been entered in the books of the Monmouth Trust and Safe Deposit Company; it had been delivered by the defendant Cornell in blank to the defendant Twining. The balance of the $44,875 as appears by the evidence before mentioned, was paid by two $5,000 checks of Albert C. Twining, and whether the stock was purchased by and for Albert C. Twining's own account or for a purchasing pool or for the Trust and Safe Deposit Company, does not matter; no attempt was made at the trial to prove that this money, to wit: the sum of $44,875 was embezzled or stolen by the defendants. The evidence only goes to show that that amount of money had been taken from the funds of the Trust and Safe Deposit Company on the 19th day of January and the 4th day of February, 1903, and that $35,000 and some dollars had not been entered upon the books of the bank, that the entry made on the 13th day of February was a false entry and made to deceive Mr. Vredenberg or whoever might come to examine into the condition of said trust company.

Mr. Vredenberg being the examiner sent, then it was exhibited to deceive him; it not only was exhibited but it was false and for the purpose of deceiving; and had it not been for the fact that Mr. Vredenberg discovered from Mr. Patterson and Mr. Tusting that the paper was false, it would have been misleading and have deceived him. It would show that the Monmouth Trust and Safe Deposit

Company had purchased the stock and the stock belonged to it. They had a right to purchase it. By the minutes, if true, it had purchased the stock on February 13th, 1903. By the undisputed evidence the stock had been purchased July 19, 1903, by a purchasing pool.

I submit that the proof clearly shows this fact. I also submit that there was no error in the ruling of the court upon the indictment, and that the defendants were not prejudiced by the exclusion of any legal evidence offered on the part of the said defendants, as by the record it appears that no evidence whatever was offered by them I also submit that no illegal evidence was submitted on said trial or allowed to stand against the motion of the said defendants That the exhibit offered relating to the correct minutes might have been an error, they not being the minutes upon which the indictment was founded, were it not for the fact that exhibit No. 9 is clear and conclusive that there were no minutes and no meeting of the board of directors on the 9th day of February at all. That from the evidence as appears by the record, the court of quarter sessions did not err in refusing to direct the jury to acquit the defendants; that the said court of quarter sessions did not err in refusing at the close of the whole case to direct the jury to acquit the said defendants. I further submit that the judgment in this case should not be reversed but should stand.

The indictment in this case was found in the Court of Oyer and Terminer at Freehold, in and for the County of Monmouth, State of New Jersey, by the grand jury, at the January Term 1904, of said Court.

The defendants were tried before a jury on the first day of March, 1904, and found guilty as they stood charged in the indictment.

A rule to show cause was granted, why the verdict should not be set aside and a new trial granted; which rule was, after argument, discharged.

On the third day of May 1904, the said defendants being produced in court, were sentenced.

The case was carried to the Supreme Court of the State of New Jersey upon a Writ of Error, and was argued on the 21st day of February, 1905. On the third day of November, 1905, the opinion of the Supreme Court was filed, affirming the judgment of the Court below; a long opinion being written by Justice Fort, which appears upon page 124 of the case, side page 178.

A Writ of Error was sued out carrying the judgment from the Supreme Court to the Court of Errors and Appeals of the State of New Jersey. The case was argued in the court of Errors and Appeals upon the exceptions filed to the judgment of the Supreme Court, which are found upon page 130 of the case, side pages 188 to 201 inclusive. The case was fully argued on the 19th of November, 1906, and the opinion of the Court was delivered by Chancellor Magie, the presiding judge of the Court of Errors and Appeals, which said opinion is found upon page 139 of the case, side pages 201 to 210 inclusive.

A Writ of Error was then taken to this Court and it is here now for argument upon Assignment of Errors from judgment of the Court of Errors and Appeals in the Last Resort in all causes of the State of New Jersey, and there is but one question to be decided by this Court and it is found in the Assingment of Errors, page 149 of the transcript, side pages 217 to 228 inclusive. All of which go to the charge of the Judge of the Trial Court to the jury as to what the Court said to the jury in relation to the defendant standing mute or not going upon the stand.

That question will be dealt with by the Attorney-General of the State of New Jersey, in the Brief following.

H. M. NEVIUS,

*Prosecutor of the Pleas for Monmouth County New Jersey.*

# Supreme Court of the United States,

## October Term, 1907. No. 187.

ALBERT C. TWINING AND DAVID C. CORNELL,
*Plaintiffs in Error,*
*vs.*
THE STATE OF NEW JERSEY,
*Defendant in Error.*

In Error to the Court of Errors and Appeals of the State of New Jersey.

**Brief on Behalf of Defendant in Error.**

### STATEMENT.

The assignments of error filed by the plaintiffs in error show that jurisdiction of this Court is claimed by reason of the alleged violation of a right or immunity guaranteed, as is said by the Fourteenth Amendment of the Federal Constitution. The sufficiency of these assignments depends upon the correctness of the conclusion drawn by the pleader, that by the charge of the trial court the plaintiffs in error were placed in a position equivalent to a compulsory self crimination, or, in the language of the assignment of error, "to testify or be witnesses against themselves, or to be called on to furnish testimony or evidence against themselves, or to be

witnesses against themselves" in a criminal trial. And if this conclusion be found, upon examination to be incorrect, the assignments of error are consequently without foundation, in fact, and the writ must be dismissed.

The facts disclosed by the record are, that the plaintiffs in error, were indicted jointly for exhibiting false minutes; at the trial of this indictment there was produced, on the part of the State, direct evidence in substantiation of the charge against Cornell, and at least inferential proof against Twining. In effect the court charged the jury that as neither of the defendants had gone upon the witness stand to testify in their own behalf, the jury might consider, as to Cornell, whether that fact could have any significance, and to consider such an inference as they, the jury, might deem proper to draw from the fact, but did not charge that the fact had any significance; nor did the Court say to the jury what inference could be drawn. And as to Twining the Court distinctly charged that the fact that he had not gone upon the witness stand to testify in his own behalf could have no significance, by reason of the quality of the testimony offered against him. The jury was further advised that its verdict might lie for or against either, or for or against both, of the accused.

## ARGUMENT.

The conclusion of the pleader, as stated in the assignments of error, is that the trial court, in allowing the jury to draw an inference from the fact that the defendant Cornell did not reply to a direct criminal accusation against him, was equivalent to putting Cornell upon the stand and extracting from him, against his will, testimony harmful to himself in a criminal trial.

In opposition to this argument, and as showing the falsity of this conclusion, we contend that there is a valid distinction between (1) an infringement of the right against self crimination (assuming such right to be guaranteed by the Federal Constitution, for the moment, as it is later denied); (2) the drawing of an inference from the exercise of the claim of the privilege against compulsory self-crimination when a question properly decided to raise the question of privilege is presented to a defendant when in a testimonial capacity; and (3) the submission by a trial court to a jury of the fact that one of two defendants directly charged with a criminal act, had not offered any testimony in answer thereto, with such significance as the jury might determine to exist therefrom, when the jury was later advised that their verdict did not necessarily lie against both defendants.

That this distinction exists and that the conclusion of the pleader is incorrect, the following argument is advanced.

The privilege against compulsory self-crimination applies only to a witness, that is to a person in a testimonial capacity.

> "In the interpretation of the principle, referring to privilege against self-crimination, nothing turns upon the variations of wording in the constitutional clauses; this much is conceded.
>
> It is therefore immaterial that the witness is

protected by one Constitution from 'testifying,' or another from 'furnishing evidence,' or by another from 'giving evidence,' or by still another from 'being a witness.' These various phraisings have a common conception, in respect to the form of the protected disclosure. What is that conception? Looking back at the history of the privilege and the spirit of the struggle by which its establishment came about the object of the protection seems plain. It is the employment of legal process to extract from the person's own lips an admission of his own guilt, which will thus take the place of other evidence. * * * * Such, too, is the inference from the policy of the privilege as a defensible institution; that is to say, it exists mainly in order to stimulate the prosecution to a full and fair search for evidence procurable by their own exertions, and to deter them from a lazy and pernicious reliance upon the accused's confessions. Such, finally, is the practical requirement that follows from the necessity of recognizing other unquestioned methods of procuring evidence; for if the privilege extended beyond these limits, and protected an accused otherwise than in his strictly testimonial status, if, in other words, it created inviolability not only for his physical control of his own vocal utterances, but also for his physical control in whatever form exercised, then it would be possible for a guilty person to shut himself up in his house, with all the tools and indicia of his crime, and defy the authority of the law to employ in evidence anything that might be obtained by forcibly overthrowing his possession and compelling the surrender of the evidential articles, a clear reductio ad absurdum. In other words, it is not merely compulsion that is the kernel of the privilege, in history and in the constitutional definitions, but testimonial

compulsion. The one idea is as essential as the other.

The general principle, therefore, in regard to the form of the protected disclosure, may be said to be this: The privilege protects a person from any disclosure sought by legal process against him as a witness."

WIGMORE ON EVIDENCE, VOL. 3, PAR. 2263.

The same author goes on to say:

"The privilege is merely an option of refusal, not a prohibition of inquiry. Hence, when an ordinary witness is on the stand, and a criminating fact, relevant to the issue, is desired to be proved through him, the question may be asked, and it is for him then to say whether he will exercise the option given him by the law. It cannot be known before hand whether he will refuse. Besides, to prevent the question would be to convert the option into a prohibition. This principle would seem incapable of dispute. * * * * Accordingly, it is universally conceded that the question may be put to the witness on the stand; and the same rule applies to interrogatories in a bill of discovery, both in ordinary chancery practice and under modern statutory interrogatories to the adverse party. Whether the refusal, in case of written interrogatories of discovery, should be by plea or by answer has been a much mooted question, depending on the orthodox technicalities of pleading in chancery."

(PARAGRAPH 2268).

The plaintiffs in error did not offer themselves as witnesses, and never went before the jury or the court in a testimonial capacity. No claim of privilege was made. No question was asked upon

which the court, in the presence of the jury, might properly grant, or wrongfully withhold, the privilege. There was no inference thereby raised in the minds of the jurymen, an inference which under a grant of a claim of privilege might, and ordinarily does, arise in the minds of ordinary men. Nor did the court charge that an inference of guilt would necessarily rise or could rise from a failure to deny a criminal accusation when the opportunity offered. The court said to the jury that they might consider the fact that the defendant Cornell, having heard himself directly accused of a criminal act, did not go upon the witness stand either to affirm or deny, and in varying phrases the court left it to the jury to consider what inference, if any, they might draw from that fact. As to the defendant Twining, they were specifically told that they could draw no inference. This court cannot assume that the jury drew any inference hostile to Cornell as a result of the charge of the court. It cannot assume that they even considered the matter. There is in the record abundant direct proof of the criminal accusation produced by the State. It does not appear that the State relied, or intended to reply upon any confession or self-crimination on the part of the accused. The verdict could well stand without any support from the inference which plaintiffs in error must show was drawn in a hostile and improper manner against them. Had the trial court charged the subject matter of the inference as a necessary result from the fact, or stated that the jury could draw a certain inference, it is conceivable that a different state of facts might exist, but in the present case it was left to the jury to say whether the fact had any significance at all as against one defendant. They were specifically told that as against the other defendant the fact was without significance, and therefore there was nothing in the action of the court of a compulsory nature binding the action of the jury. The jury was merely left to

consider a fact which was as open, as well settled, as any physical quality of the defendants themselves It might as well be argued that the jury found a verdict upon a dislike to the physical appearance of the defendants, as to argue that it was found or affected by the charge of the court in the present instance.

The distinction which counsel here insist upon, is not without support in the decisions of the courts of New Jersey. By way of preface a few introductory statements are necessary. They present essential facts which must be constantly borne in mind throughout the whole of this discussion.

The Constitution of New Jersey contains no guarantee of the privilege against compulsory self-crimination. State V. Zdanowicz, 69 N. J. L , 619. The State of New Jersey shares with the State of Iowa this peculiarity as against all other jurisdictions of the Federal Union. This distinction also is to be noted. An act of Congress permits a person charged with an offense against the United States to be a competent witness on his own request, and expressly provides that his failure to make such request shall not create any presumption against him. The acts of other states extending to an accused the privilege of being a witness in his own behalf, which was denied at common law, generally imposed the same limitation upon the fact of his failing to take advantage of the privilege. Some of those acts expressly forbid all allusions to such failure by either court or counsel. In 1871 the Legislature of New Jersey, by the act which afterward be came section eight of "An act concerning evidence," (Gen. Stat. of N. J., P. 1398) extended to the accused the same privilege, but the act imposed no restriction or limitation. The accused was simply admitted to testify in his own behaif, if he offered himself for that purpose. This provision with reference to criminal trials is now embodied in the

criminal procedure act of New Jersey, which, in its essential part, is as follows:

> "Upon the trial of any indictment, the defendant shall be admitted to testify, if he shall offer himself as a witness."

(P. L. 1898, CHAP. 237, PAR. 57).

The first Constitution of the State of New Jersey, adopted July 2d, 1776, contained these two provisions:

> "XVI. That all criminals shall be admitted to the same privileges of witnesses and counsel, as their prosecutors are or shall be entitled to."
>
> "XXII. That the common law of England, as well as so much of the statute law, as have been heretofore practiced in this colony, shall still remain in force, until they shall be altered by a future law of the legislature; such parts only excepted, as are repugnant to the rights and privileges contained in this charter; and that the inestimable right of trial by jury shall remain confirmed, as a part of the law of this colony, without repeal, forever."

It was decided however by the highest court of New Jersey, in 1903, that although it had not been deemed necessary to insert in the Constitution of this State any prohibition against compulsory self-crimination, the common law. doctrine unaltered by legislation or lax practice, is deemed to have its full force. "In New Jersey, no person can be compelled to be a witness against himself." State V. Zdanowicz, 69 N. J. L , 619, 622.

This, then, is law in New Jersey. And it was so held in 1863, prior to the adoption of the Fourteenth Amendment to the Federal Constitution. In the case of Marsh V. Marsh, 16 N. J. Eq. 391-397, a bill

for discovery as to whether a respondent in an action for divorce had not committed adultery, was dismissed upon demurrer raising this privilege.

And yet the courts of New Jersey, while never from the beginning, denying the common law right of a privilege against compulsory self crimination, when properly claimed, have always recognized the distinction between that privilege, when claimed, and the submission to a jury of the question as to whether any inference was to be raised from the want of denial of a criminal allegation or charge. The two principles have existed in the same jurisdiction side by side, and there is no conflict between the two lines of authorities. That this is true is shown by the following cases.

In 1857, the Supreme Court of New Jersey, in a capital case, Donnelly v. State, 26 N. J. L. 463, 504, after the matter had been thoroughly presented, said :

> "A confession may be inferred from the conduct and demeanor of a prisoner when a statement is made in his presence affecting himself, unless such statement is made under circumstances which prevented a reply. Bartlett's case, 7 Car. & P. 832; Joy on Conf. 77; 1 Greenl. Ev., Par. 215; I Phil. & Amos 452.
>
> In the most recent treatise on criminal law the rule is thus stated: 'Where a man, at full liberty to speak, and not in the course of a judicial inquiry, is charged with a crime, and remains silent, that is, makes no denial of the accusation by word or gesture, his silence is a circumstance which may be left to the jury.' Wharton's Cr. Law, (ed. 1867), Par. 696, (ed. 1852) 258.
>
> In civil actions the same principle prevails. What is asserted in the presence of a party to a

suit, and not contradicted by him, is received on the ground that his silence is an admission of the truth of what was said. Bottans V. Sellers, 5 Har. & Johns. 119; 2 Phil. Ev. (Cow. & H , notes) 192, note 191.

The degree of credit due to such tacit admission is to be estimated by the jury under the circumstances of each case. I Greenl. Ev., Par. 215.

It is admitted that such evidence should always be received with great caution. In some cases it may be equivocal and of the lightest possible value, in others it may be entitled to much weight. Its value must of necessity be estimated by the jury. If it be doubtful whether the party heard or understood the proposition to which his silent assent is claimed, the jury may determine it. State v. Perkins, 3 Hawks. 377; Perry V. The State, 10 Georgia 311; 2 Phil. Ev. (Cow. & H., notes 194, note 191.

AND SO ON PAGE 613:

"So, also, silence, unless it be accounted for by some of the circumstances which have been specified, or by other sufficient reasons, may be taken as a tacit admission of the fact stated; because a person knowing the truth or falsity of a statement affecting his rights, made by another in his presence, under circumstances calling for a reply, will naturally deny it, if he be at liberty so to do, if he does not intend to admit it

Whatever is said to a prisoner on the subject matter of the charge, to which he made no direct reply, is receivable as evidence of an implied acquiescence on his part. 5 Car. & Payne 332. The admissibility of this evidence is all that can be determined on a writ of error Its effect un-

der the circumstances of the case, was committed to another forum."

This practice was followed in Parker v. State, 61 N. J. L. 308, from which we quote:

"Another assignment of error is based upon a portion of the charge of the court, a general exception having been allowed to the whole charge. The court had stated to the jury that several witnesses had testified to repeated sales of the liquors named in the indictment having been made by plaintiff in error to them and to others in their presence. Thereupon the court added 'the defendant has heard this evidence but has remained in his seat without attempting to deny or contradict the testimony given by the state's witnesses, neither has any other witness been called to refute it. Under the circumstances, the court submits the case for your determination.'

This raises for the first time in this state the question of the effect to be attributed to the failure of a defendant in an indictment to avail himself of the right accorded by our statute to be a witness in his own behalf.

An act of congress permits a person charged with an offense against the United States to be a competent witness on his own request, but expressly provides that his failure to make such a request shall not create any presumption against him. Rev. Stat. U. S., 1 Sup, P. 312. The acts of other states extending to an accused the privilege of being a witness in his own behalf, which was denied at common law, generally imposed the same limitation upon the fact of his failing to take advantage of the privilege. Some of those acts expressly forbid all allusion to such failure by either court or counsel.

In 1871 our legislature, by the act which is

now section 8 of the act concerning evidence (Gen. Stat., P. 1398), extended to the accused the same privilege, but the act imposed no restriction or limitation. The accused was simply admitted to testify in his own behalf if he offered himself for that purpose.

Does our act, containing no express restriction, impliedly prohibit consideration and comment upon the failure of an accused to avail himself of the privilege accorded to him? I have reached the conclusion that it does not in all cases.

It is well settled that evidence may be admitted against an accused, establishing the fact that declarations or charges of his guilt were made to him and that he made no reply, provided that the occassion was such that a reply from him might be properly expected. This rule was approved by the Supreme Court, speaking by Chief Justice Green, in the case of Donnelly v. State, 2 Dutcher 504, and by the Court of Errors, speaking by Mr. Justice Ogden, in the same case, Id. 612. Statements thus admitted are not direct evidence against the person charged, but his conduct, when such statements are made, is admissible so far as it tends to show acquiescence therein by silence when he would naturally speak. So, if such statements are made in the course of judicial investigation, in which he is not called on to answer directly, and in which his response would interfere with the orderly and regular proceedings, his silence may not be proved. I Tayl. Ev., Par. 813.

But when the accused is upon trial, and the evidence tends to establish facts which if true would be conclusive of his guilt of the charge against him, and he can disprove them by his own oath as a witness, if the facts be not true, then his silence would justify a strong inference

that he could not deny the charges.

Such an inference is natural and irresistible. It will be drawn by honest jurymen, and no instructions will prevent it. Must a court refrain from noticing that which is so plain and forcible an indication of guilt? In my judgment there is no rule of law requiring it. The rights of the accused are not invaded or denied by proper comment on his silence.

There may be cases in which the evidence against the accused does not directly affect him, and a reply from him could not necessarily be expected. His failure to offer himself as a witness when his testimony could not meet or disprove any particular fact or circumstance and could only consist of a general denial of guilt, probably ought not to affect him, and if so, his silence should not be commented on or considered. But, in a case such as that before us, I think silence, when witnesses had proved unlawful acts, which, if true, established his guilt, and which he might dispose of if untrue, was capable of raising an inference of admission by acquiescence, and might be commented on with the strictest regard to justice and the rights of the accused.

No error being found in the record or proceedings, the judgment will be affirmed."

So also in State v. Wines, 65 N. J. L. 31, where a distinction is drawn between direct and indirect accusation with reference to possible inference. All these latter decisions were before the Supreme Court of New Jersey in the present case (see page 124 of the record), and also before the Court of Errors and Appeals (page 139), and as the court is always presumed to know the law, it must be assumed that their approval of these cases carried with it the approval of the other distinguishable principle of

privilege against compulsory self-crimination, and in each instance the cases which have been cited have been approved by the courts of last resort of this state.

A result of this review is that two facts are thereby made absolutely clear. There is clearly recognized in New Jersey a right against compulsory self-crimination; and also it has never been considered that this right was abridged or infringed by the submission to a trial jury of the right to draw an inference, if they saw fit to do so, from the fact of the silence of an accused person in the face of a direct criminal accusation.

As to the plaintiffs in error, citizens of New Jersey, and citizens of the United States because, in this instance, they are citizens of New Jersey, the charge of the trial court was not equivalent to an infringement of the privilege against self-crimination, as it has always been recognized in New Jersey. The conclusion on which the assignments of error are based is not correct, and the writ is without support, because the plaintiffs in error were not, by the charge of the trial court, compelled to be witnesses or to furnish testimony against themselves.

But if the Court shall be of the opinion that the conclusion of the pleader, as stated in the assignments of error, is warranted and well founded, and that the charge of the trial court had the effect of violating the privilege against compulsory self-crimination, we answer to the first assignment that it discloses no fundamental right or immunity guaranteed to the plaintiffs in error as citizens of the United States by the Fourteenth Amendment

of the Federal Constitution which has been abridged by the decision of the court of last resort of New Jersey.

The first section of the Fourteenth Amendment, upon which his claim of jurisdiction in this court is based, is as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. Nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

It remains, then, to discover what rights are guaranteed to citizens of the United States by this Amendment, and whether, if the alleged fundamental right pleaded is so guaranteed, it has been so abridged by the State of New Jersey as to confer corrective jurisdiction upon this court. While it is unquestionably true that there has always been in existence in this country a general government over and among the states, the sole rights secured by constitutional provision prior to the formation of the present Federal Government were those of the citizens of the several states. In these several constitutions, as in that of New Jersey, the inhabitants of each state declared the limitations which were deemed essential to the protection and preservation of their cherished rights. The powers of the states differ in this respect from the powers of the general government, because, representing the people of the state, each state government exercises those powers against which it is not restrained by the limitations of the State Constitution; while the general government, being a government of delegated powers, exercises only those powers which

are contained in the provisions of the Federal Constitution. In the rights and restrictions under the State Constitutions, therefore, rest the rights of the citizens of the states as such.

When a Federal Government was later formed, a Federal citizenship first came into being, not dependent upon the State Constitutions, and not equipped with common law rights, but dependent upon the essential requisites and provisions of the instrument, the Federal Constitution, which called it into being. The rights of a citizen of the United States may be those of a citizen of any of the states by virtue of the two citizenships existing conjointly in any one person, but they are not necessarily coincident; and the rights of a citizen of the United States are not necessarily those of a citizen of any of the individual states

In considering the limitations upon State activity and the creation of privileges and immunities of the citizens of the United States, arising out of the 14th Amendment, Story on the Constitution, 5th Ed. Par. 1936, says :

> "It is to be observed, however, that it is not the privileges of citizens of the several States which are to be protected under the clause now being considered, but 'the privileges and immunities of citizens of the United States.' The difference is in a high degree important. Although citizens of the United States are commonly citizens of individual States, this is not invariably the case, and if it were, the privileges which pertain to citizenship under the general government are as different in their nature from those which belong to citizenship in a State as the functions of the one government are different from those of the other. Indeed it is a consideration of the sphere of the governments respectively which suggests the rights and privileges as citizens of those entitled to their protection ;

a citizen of the United States, as such, has the right to demand protection against the wrongful action of foreign authorities; to have the benefit of pass ports for travel in other countries; to make use in common with all others of the navigable waters of the United States; to participate with others in the benefits of the postal laws, and the like. It would be useless to attempt a general enumeration, but these few may suffice as illustrations, and will suggest others. Such rights and privileges the general government must allow and ensure, and such the several States must not abridge or obstruct; but the duty of protection to a citizen of a State in his privileges and immunities as such is not by this clause devolved upon the general government, but remains with the State itself where it naturally and properly belongs."

Further, in reference to this question the Supreme Court of the United States, in the case of Kemmler, 136 U. S. 448, spoke as follows:

"This amendment did not radically change the whole theory of the relations of the state and Federal Governments to each other, and of both governments to the people. The same person may be at the same time a citizen of the United States and the citizen of a State. Protection to life, liberty and property rests primarily with the States, and the amendment furnishes an additional guarantee against any encroachment by the States upon these fundamental rights which belong to citizenship, and which the State governments were created to secure. The privileges and immunities of a citizen of the United States as distinguished from the privileges and immunities of a citizen of the States are indeed protected by it, but those are privileges and immunities arising out

of the nature and essential character of the national government and granted or secured by the Constitution of the United States."

See also Duncan v. Missouri, 152 U. S. 382. In Wadleigh v. Newhall, 136 Fed. Rep. 946, this same court said:

> "The rights, privileges and immunities which this clause guarantees, and which section 1979, R. S. was designed to protect, were the rights, privileges and immunities which belong to citizens of the United States, as such, but not the rights, privileges and immunities which belong to citizens of a State. There are privileges and immunities belonging to citizens of the United States in that relation and character, and it is these, and these alone, that a State is forbidden to abridge."

The plaintiffs in error, by their assignments of error, declare that they have been abridged of an immunity guaranteed to them by the Fourteenth Amendment of the Federal Constitution as citizens of the United States. There is no claim that the rights or immunities as citizens of the State of New Jersey, or of any other State, have been abridged. They put themselves in that class of persons whose privileges and immunities arise out of and are protected by the Federal Constitution.

There is in the Federal Constitution, the source of the rights and immunities of the plaintiffs in error as citizens of the United States, no guarantee of a privilege against compulsory self-crimination which is binding upon the courts of New Jersey, or the abridgment of which by the State courts would give corrective jurisdiction in the Federal Supreme Court. In other words, even if it be granted that the statements and conclusions of the assignments of error are correct, at the same time there has been no violation by the State of New Jersey of any

right of the plaintiffs in error as citizens of the United States.

The only basis for a contrary claim is found in the Fifth Amendment of the Federal Constitution, in that clause which reads, "Nor shall be compelled in any criminal case to be witness against himself." It is well established, however, that the Fifth Amendment of the Federal Constitution is binding only on the Federal Government and its agencies, and is not a limitation upon any of the States composing the Federal Union. The rights or immunities which it creates, therefore, are rights and immunities against Federal, but not against State interference or abridgment. The leading case upon this point is Barron v. Baltimore, 7 Peters, 243, in which Chief Justice Marshall delivered the opinion of this court, from which we quote as follows:

> "The constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual states. Each state established a constitution for itself, and, in that constitution, provided such limitations and restrictions on the powers of its particular government as its judgment dictated. The people of the United States framed such a government for the United States as they supposed best adapted to their situation, and best calculated to promote their interests. The powers they conferred on this government were to be exercised by itself; and the limitations on power, if expressed in general terms, are naturally, and, we think, necessarily applicable to the government created by the instrument. They are limitations of power granted in the instrument itself; not of distinct governments, framed by different persons and for different purposes.
>
> If these propositions be correct, the fifth amendment must be understood as restraining

the power of the general government, not as applicable to the states."

"We are of opinion that the provision in the fifth amendment to the constitution, declaring that private property shall not be taken for public use without just compensation, is intended solely as a limitation on the exercise of power by the government of the United States, and is not applicable to the legislation of the states."

This case was reviewed and followed in Twitchell v. The Commonwealth, 7 Wall. 321; Walker v. Sauvinet, 92 U. S. P. 90; Hallinger v. Davis, 146 U. S. 314; Holden v. Hardy, 169 U. S. 366; Munn v. Illinois, 94 U. S. 113; Kelly v. Pittsburg, 104 U. S. 78; Nashville v. Alabama, 128 U. S. 96; Davis v. Texas, 139 U. S. 651.

In Scott v. Toledo, 36 Fed. Rep. 385, the Court said:

"The fifth amendment operating only as a limitation upon the powers of the general government, fell short of giving to the citizen the full protection to which he was entitled in respect to his life, liberty and property so far as state action was concerned. It imposed no prohibition or limitation upon the power and authority of the states in dealing with the life, liberty and property of the citizen. They were left to the restraint of their several constitutions and respective laws on these subjects. So far as the states were concerned citizens of the United States were thus left without adequate protection and security in their persons and property. The fourteenth amendment was adopted to remedy and correct this defect in the supreme organic law of the land."

The opinion of the Court in the so-called Slaughter House cases, 16 Wall. 36, is to the same effect:

> Art. IV., section 2, of the United States Constitution did not create those rights which it called privileges and immunities of citizens of the states. It threw around them in that clause no security for the citizen of the state in which they were claimed or exercised. Nor did it profess to control the power of the state government over the rights of its own citizens. Its sole purpose was to declare to the several states that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other states within your jurisdiction."

The plaintiffs in error have elected to stand before this court as citizens of the United States, claiming rights and privileges as such. They make no claim to this court as citizens of New Jersey. Whatever rights and immunities, therefore, have been abridged are not a matter of concern to this court unless they can be shown to have had their origin in the Constitution of the United States, or its amendments, or the necessary requisites thereof. The only right against compulsory self-crimination guaranteed to citizens of the United States is a right and immunity operative in Federal courts, or in any sphere of Federal influence, but there is no such right guaranteed as such to citizens of the United States by the Constitution of the United States or its amendments, which the State of New Jersey is obliged to consider. So far as citizens of the United States are concerned, they can make no complaint against the action of the Courts of New Jersey in the present case, and there is, therefore, presented to this court, no reason for its intervention shown by the first assignment of error, if the alleged right, which it is therein claimed has been abridged wrongfully by the State of New Jersey, does not appear to

have been one of those rights guaranteed to the citizens of the United States by the Fourteenth Amendment of the Federal Constitution.

But if it shall be argued that since the Fourteenth Amendment was binding on the States, and that thereby the plaintiffs in error, as citizens of the United States, are entitled to the privileges which all citizens of New Jersey enjoyed at the time of the promulgation of this amendment, in addition to those rights guaranteed to citizens of the United States, as such, subject to no abridgment by the State of New Jersey, though this proposition is denied as without support in authority or principle, the answer is simple and benefits the plaintiffs not at all. Such an argument, if made, must rest upon the interpretation given to the first sentence of the first section of the Fourteenth Amendment, which is as follows :

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

It it be true that this amendment added to the civil rights of citizens of the United States, the civil rights peculiar to the other citizens of any State in which they might choose to reside, and so far abolished the distinction between citizenship of a State and of the United States, then it is only necessary to inquire into the status of the rights and immunities with reference to the privilege against self crimination enjoyed by the citizens of the State of New Jersey at the time of the promulgation of the Fourteenth Amendment.

This amendment created no new civil rights. It merely extended the operation of existing rights, and furnished additional protection to such rights. Barbier, v. Connolly, 113 U S. 27; United States v. Sanges, 48 Fed. Rep. 78; Minor v. Happersett, 21

Wall. 171; United States v. Cruikshank, 92 U. S. 542.

If, therefore, there was added to the civil rights and immunities guaranteed to the plaintiffs in error as citizens of the United States, any additional immunities or rights by virtue of the Fourteenth Amendment, it is inconceivable that the addition should comprise any other than those rights and immunities which were common to all other citizens of New Jersey in July 1868, when the Fourteenth Amendment went into effect. If the State of New Jersey was restrained from further or thereafter diminishing the rights of its citizens and of citizens of the United States resident within its borders, by the operation of this amendment, the rights and immunities secured thereby from abridgment to all citizens of the State of New Jersey, including those citizens of the United States who might be resident therein, with reference to the particular privilege of freedom from compulsory self-crimination, was the privilege as it then existed in the State of New Jersey, and was then administered to all its citizens impartially by its courts. That right and no other which was at that time legally and constitutionally accepted throughout the jurisdiction of the State of New Jersey. Citizens of the United States, resident in New Jersey, could have had at that time no greater rights or immunities than the other citizens of New Jersey enjoyed.

To a citizen of the United States, as we have shown, there was at the time of the adoption of the 14th Amendment to the Federal Constitution, no guaranteed privilege or immunity with reference to an alleged error complained of which the courts of New Jersey were bound to recognize, and in the courts of New Jersey as to all persons under their jurisdiction, there was no right or immunity against the submission by a trial court to a jury of the question and matter submitted in this case. As was demonstrated in that part of the brief which treated

of the first argument advanced, the courts of New Jersey had established at that time the principle of privilege against self crimination, and had also established as a paralled and not as a contradictory principle, that the question of inference to be raised by the failure to deny a direct criminal accusation when opportunity offered, might properly be submitted to a jury. This was the status of the right and immunity with reference to self-crimination as it was guaranteed, if at all, to the plaintiffs in error as citizens of the United States by the Fourteenth Amendment, so that it is a matter of indifference whether the plaintiffs in error claim civil rights as citizens of the United States, meaning thereby those civil rights specifically granted or necessarily arising from the provisions of the Federal Constitution, or as citizens of New Jersey or both. They cannot show the existence of any fundamental right or immunity against compulsory self-crimination, guaranteed by the Fourteenth Amendment of the Federal Constitution, which has been abridged by the Courts of New Jersey, as alleged by the pleader in his first assignment of error. On the contrary the charge of the trial court in the present case was in accordance with the legal recognition of the right of self crimination as that right existed in the State of New Jersey from the very beginning, and which has not been altered or attempted to be altered since the passage and adoption of the Fourteenth Amendment of the Federal Constitution.

The second assignment of error is based on similar conclusions of the pleader, and is put forward as a denial of due process of law.

What due process of law was guaranteed to the plaintiffs in error as citizens of the United States or of the State of New Jersey by the Fourteenth Amendment? Under the first section of this amendment no distinction is made in citizenship with reference to a right of due process of law. All

persons before the State are entitled to it. But what is due process of law, and was it abridged in this instance?

Of course, if the court shall sustain the first assignment of error, the second follows with it, for it is unquestioned that if the plantiffs in error were convicted and sentenced in derogation of a constitution right, they were thereby deprived of their liberty and property without due process of law. The enforcement of a valid statute in an unconstitutional way, equally with the enforcement of an unconstitutional statute, will produce this result. But if, on the other hand, it be considered that the first assignment of error is not well founded, it is clear that the plaintiffs in error have no just complaint on the basis of any want of due process of law.

As was said in Hallinger v. Davis, 146 U. S., P. 321,

> "The Fourteenth Amendment does not profess to scure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two States separated only by an imaginary line. On one side of this line there may be a right of trial by jury, and on the other side no such right. Each State prescribes its own modes of judicial proceedings."

This was a recital, with approval, from Missouri v. Lewis, 101 U. S. 51, 52. The court went on to say:

> "Due process of law (referring to the Fifth Amendment) refers to that law of the land which derives its authority from the legislative powers conferred upon Congress by the Constitution of the United States, exercised within the limits therein prescribed, and interpreted according to

the principles of the common law. In the Fourteenth Amendment, by parity of reason, it refers to the law of the land in each state, which derives its authority from the inherent and reserved powers of the state, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, and the greatest security for which resides in the right of the people to make their own laws and alter them at their pleasure."

To the same effect are Holden v. Hardy, 169 U. S. 366, 389; Hurtado v. California, 110 U. S. 535; Walker v. Sauvinet, 92 U. S. 92.

The greater part of the preceding argument with reference to the civil rights of citizenship applies here with equal force. Unless some constitutional right is invaded, due process means the established procedure in courts having jurisdiction according to the State laws and constitution. The Fourteenth Amendment legitimately operates to extend to the citizens and residents of the States the same protection against arbitrary State legislation affecting life, liberty and property, as is offered by the Fifth Amendment against similar legislation by Congress. But the Federal Courts ought not to interfere when what is complained of amounts to the enforcement of the laws of a state applicable to all persons in like circumstances and conditions, and the Federal Courts should not interfere unless there is some abuse of law amounting to confiscation of property or deprivation of personal rights. Fed. Stat Ann. Vol. 9, P. 427.

Due process of law guaranteed by the Fourteenth Amendment, as has been shown, refers only to the process of law which was in force and enforcible within the State jurisdiction at the time of the adoption of the Fourteenth Amendment. No change

has been made in the procedure of the State with reference to the particular right or immunity claimed by the plaintiffs in error in this case since the adoption of that Amendment. Whatever rights were guaranteed to the citizens of New Jersey as due process of law with reference to the privilege of immunity from compulsory self-crimination, still obtain unaltered and unabridged, and the plaintiffs in error cannot complain therefore of any alteration of any due process of law which was guaranteed to them by the Fourteenth Amendment. There was no objection to the jurisdiction of the trial court made below, therefore none can be raised now, and it must be assumed that that court had jurisdiction. There was no objection raised to the statute upon which the conviction was based, either at the trial or before either of the reviewing courts of New Jersey, that it violated any of the rights or immunities guaranteed by the Federal Constitution. The only Federal question which was raised before the courts of New Jersey was based upon the charge of the court, turning upon the privilege of freedom from self crimination. The process by which the plaintiffs in error were convicted and sentenced admittedly was according to the established procedure in the State of New Jersey, and unless a fundamental right guaranteed by the Federal Constitution was violated, there was no denial of due process of law. The second assignment of error, therefore, must stand or fall with the first.

Finally, the plaintiffs in error complain that they were denied the equal protection of the laws, and urge in support thereof the conclusion of the pleader before referred to. It is difficult to apprehend the exact basis or nature of this complaint. Evidently a denial of the equal protection of the laws must find its evidence in some discrimination, in some unequal protection or application of law or procedure. There is nothing of that nature apparent on the face of the record as having been presented to either of the courts of New Jersey as raising any question under the Federal Constitution. There was no compaint that the statute was unequal in its operation, or that it bore with more severity upon the plaintiffs in error than upon other citizens of the State, or that it favored one class as against another. The constitutional questions presented with reference to the statute were solely with reference to the Constitution of New Jersey and were so considered by the courts of that State. If there was any discrimination it must be because, as the plaintiffs in error allege, they were deprived of a constitutional right guaranteed to them by the Fourteenth Amendment of the Constitution, and yet the same argument advanced under the last topic applies here. The Fourteenth Amendment guaranteed no rights and no protection which was not in existence at the time that amendment went into operation in the State of New Jersey, and there does not appear to have been, from the cases shown, any alteration in the policy of the courts of that State with reference to the privilege complained of since that amendment went into effect. This assignment of error, like its predecessor, depends for any force upon the question of right and immunity raised by the first assignment of error. If the charge of the court was legal and in accordance with the rights of the plaintiffs in error under the Federal Constitution, there is no basis for the contention of discrimination, and this assignment, therefore, has no merit independent of the first assignment and must stand or fall with it.

The question raised by the additional assignments are fully covered by this discursion. It is respectfully submitted, therefore, that the writ of error should be dismissed.

NELSON BURR GASKILL,
Assistant Attorney-General of N. J.

ROBERT H. McCARTER,
Attorney-General of N. J.

Office Supreme Court, U. S.
FILED.
MAR 18 1908
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. ~~182~~ 10

ALBERT C. TWINING AND DAVID C. CORNELL,
PLAINTIFFS IN ERROR,

*v.*

THE STATE OF NEW JERSEY, DEFENDANT IN ERROR.

# SUPPLEMENTAL BRIEF FOR DEFENDANT IN ERROR.

NELSON B. GASKILL,
*Assistant Attorney General,*
ROBERT H. McCARTER,
*Attorney General,*
*Of Counsel.*

(20,508.)

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

## No. 187.

ALBERT C. TWINING AND DAVID C. CORNELL, PLAINTIFFS IN ERROR,

*v.*

THE STATE OF NEW JERSEY, DEFENDANT IN ERROR.

IN ERROR TO THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY.

## SUPPLEMENTAL BRIEF FOR DEFENDANT IN ERROR.

The Federal Supreme Court will, of its own motion, without suggestion by counsel, first review the record to determine whether it has jurisdiction over the subject-matter presented. This is the independent action of the court, whether suggested by counsel or not. It does not seem, therefore, that it is necessary to treat the matter in the brief.

It appears in the present case that in the trial court there was no Federal question raised or presented, and the assignments of error and the opinion of the Supreme Court do not disclose that any Federal question was presented to the Supreme Court reviewing the judgment of the quarter sessions.

On the writ of error from the Court of Errors and Appeals to the Supreme Court of the State of New Jersey, an assignment of error appears upon the record, in which the application of the Fourteenth Amendment of the Constitution was for the first time presented. The question is, whether this single fact appearing upon the record is sufficient to give jurisdiction to the United States Supreme Court; and it would seem that it is not. As a matter of fact, the opinion of the Court of Errors and Appeals of New Jersey does not indicate that this assignment of error from the Federal Constitution in any way came into the scope of its opinion or judgment. An examination of the briefs filed for the plaintiff in error, as the same are found in the State Library, shows that this assignment of error was not argued as such by counsel before the Court of Errors and Appeals. There is no reference in these briefs to the Federal Constitution or the Fourteenth Amendment thereto. The phrase "legal and constitutional rights," however, constantly appeared, and the reference is always to the enabling statute which allows a person under a criminal indictment to be a witness in his own behalf. There is nothing in these briefs or in the opinion of the Court of Errors and Appeals to show that the application of the Fourteenth Amendment to the cause in hand was argued to that court.

Under the practice of the court, to which the present writ of error is now directed, assignments of error not presented to the court in the argument or in the briefs of counsel are considered as waived and are not considered by the court (*Lewis v. Lewis*, 66 N. J. L., 251; *Com. Roofing Co. v. Palmer Leather Co.*, 67 N. J. L., 566; *Loper v. Summers*, 71 N. J. L., 657; *Hansen v. Penn. R. R. Co.*, 72 N. J. L., 407).

It must be evident, therefore, in view of the silence of the briefs filed by counsel in the New Jersey Court of Errors upon the application of the Fourteenth Amendment, now made the basis of this writ of error, and the absolute want

of any reference thereto in the opinion of the Court of Errors and Appeals, that this court considered that the assignment of error in question was waived. On no other explanation can the silence of this last court upon this question be explained. Had this assignment been presented to the court, the court would have been obliged to consider it, and it would thereby have been a necessary part of their decision; but being waived by not being pressed according to the practice obtaining in the New Jersey Court of Errors and Appeals, it was not before that court, made no part of their decision, and therefore was not raised at the proper time in order to vest jurisdiction in the United States Supreme Court. In support of this argument the attention of the court is directed to the case of *Hulbert v. The City of Chicago*, 202 U. S., p. 275, wherein it was argued to the court:

> "In order to give this court the power to re-examine the judgment of the State court, the title, right, privilege or immunity must be specially set up or claimed at the proper time and in the proper way, and the right on which the party relies must have been called to the attention of the court in some proper way, and the decision of the court must have been against the right claimed" (citing cases).

We contend that under the practice obtaining in the New Jersey Court of Errors and Appeals, as shown by the cases cited, the question was not called to the attention of the court in the proper way, and there was no decision of the court, either for or against the right claimed. And in the case cited this court went on to say:

> "Although the State court may have decided a Federal question, it must appear that the particular Federal question sought to be raised here was also decided (citing cases). The fact that the opinion of the State court makes no reference to the particular question sought to be presented in this court may be considered in determining whether the question was

called to the attention of the State court (*Oxley Stave Co. v. Butler County*, 166 U. S., 648, 653, 655; *Kipley v. Illinois*, 170 U. S., 182, 186; *C. & N. W. Ry. Co. v. Chicago*, 164 U. S., 454, 457; *Mich. Sugar Co. v. Michigan*, 185 U. S., 112, 113; *N. Y. Cent. R. R. Co. v. New York*, 186 U. S., 269, 273).

"This court will recognize and be governed by the rule of practice in a State court prescribing the requirements to be observed in order to save a question for review in that court (*Erie Railroad Co. v. Purdy*, 185 U. S., 148)."

And the opinion pronounced sustained this argument. This case was cited with approval and referred to in *Coxe v. Texas*, 202 U. S., 446, and in *Burt v. Smith*, 203 U. S., 135.

Upon this question the case of *Crowell v. Randell*, 10 Peters, 398, is instructive. After reviewing all cases decided prior to that time as to the foundation of jurisdiction it was held that—

"To bring a case within the twenty-fifth section of the judiciary act, it must appear upon the face of the record: 1st. That some one of the questions stated in that section did arise in the State court. 2nd. That the question was decided by the State court, as required in the same section. 3d. That it is not necessary that the question should appear on the record to have been raised, and the decision made in direct and positive terms, *ipsissimis verbis;* but that it is sufficient if it appears by clear and necessary intendment that the question must have been raised, and must have been decided in order to have induced the judgment. 4th. That it is not sufficient to show that a question might have arisen or been applicable to the case; unless it is farther shown, on the record, that it did arise, and was applied by the State court to the case."

To the same effect is the decision in the case of *Spies v. Illinois*, 123 U. S., at p. 181, where this court looked to the rules of practice governing the Supreme Court of Illinois to discover whether the question attempted to be raised was

properly presented to that court, and held that upon the facts the question had not been raised at the proper time. So in *Chappell v. Bradshaw*, 128 U. S., at p. 134; *Baldwin v. Kansas*, 129 U. S., at p. 57.

It seems clear, therefore, that this court has no jurisdiction over the subject-matter in question, for the reason that the questions now attempted to be presented to this court were not properly presented to the court to which the writ is directed, were not necessarily before that court, and did not enter into its adjudication.

NELSON B. GASKILL,
*Assistant Attorney General,*
ROBERT H. MCCARTER,
*Attorney General,*
*Of Counsel.*

# TWINING *v.* STATE OF NEW JERSEY.

ERROR TO THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY.

No. 10. Argued March 19, 20, 1908.—Decided November 9, 1908.

The judicial act of the highest court of a State in authoritatively construing and enforcing its laws is the act of the State.

Exemption from compulsory self-incrimination in the state courts is not secured by any part of the Federal Constitution.

There is a citizenship of the United States and a citizenship of the State which are distinct from each other, *Slaughter House Cases*, 16 Wall. 36; and privileges and immunities, although fundamental, which do not arise out of the nature and character of the National Government, or are not specifically protected by the Federal Constitution, are attributes of state, and not of National, citizenship.

The first eight Amendments are restrictive only of National action, and while the Fourteenth Amendment restrained and limited state action it did not take up and protect citizens of the States from action by the States as to all matters enumerated in the first eight Amendments.

The words "due process of law" as used in the Fourteenth Amendment are intended to secure the individual from the arbitrary exercise of powers of government unrestrained by the established principles of private right and distributive justice, *Bank v. Okely*, 4 Wheat. 235, but that does not require that he be exempted from compulsory self-incrimination in the courts of a State that has not adopted the policy of such exemption.

Exemption from compulsory self-incrimination did not form part of the "law of the land" prior to the separation of the colonies from the mother-country, nor is it one of the fundamental rights, immunities

and privileges of citizens of the United States, or an element of due process of law, within the meaning of the Federal Constitution or the Fourteenth Amendment thereto.

The fact that exemption from compulsory self-incrimination is specifically enumerated in the guarantees of the Fifth Amendment tends to show that it was, and is to be, regarded as a separate right and not as an element of due process of law.

When a question is no longer open in this court, adverse arguments, although weighty, will not be considered; and, under the doctrine of *stare decisis*, *Slaughter-House Cases*, 16 Wall. 36, and *Maxwell* v. *Dow*, 176 U. S. 581, approved and followed.

*Quære* and not decided whether an instruction that the jury may draw an unfavorable inference from the failure of the accused to testify in denial of evidence tending to criminate him amounts to a violation of the privilege of immunity from self-incrimination.

74 N. J. L. 683, affirmed.

ALBERT C. TWINING and David C. Cornell, the plaintiffs in error, hereafter called the defendants, were indicted by the grand jury of Monmouth County, in the State of New Jersey. The indictment charged that the defendants, being directors of the Monmouth Trust and Safe Deposit Company, knowingly exhibited a false paper to Larue Vreedenberg, an examiner of the State Banking Department, with intent to deceive him as to the condition of the company. Such an act is made a misdemeanor by a statute of the State (P. L. 1899, p. 450, at 461), which is as follows:

"Every director, officer, agent or clerk of any trust company who willfully and knowingly subscribes or makes any false statement of facts or false entries in the books of such trust company, or knowingly subscribes or exhibits any false paper, with intent to deceive any person authorized to examine as to the condition of such trust company, or willfully or knowingly subscribes to or makes any false report, shall be guilty of a high misdemeanor and punished accordingly."

The defendants were found guilty on March 1, 1904, by the verdict of a jury, and judgment upon the verdict, that the defendants be imprisoned for six and four years respectively, was affirmed successively by the Supreme Court and the Court

of Errors and Appeals. There needs to be stated here only such part of what occurred at the trial as will describe the questions on which this court is authorized to pass. It appeared that in February, 1903, the company closed its doors. The bank examiner came at once to the place of business for the purpose of examining the affairs of the company, and found there Twining and Cornell, who were respectively president and treasurer as well as directors. Having soon discovered that according to a book entry there had been a recent payment of $44,875, for 381 shares of stock, the examiner inquired of the defendants by what authority this had been done, and was informed that it was done by authority of the board of directors, and the following paper was produced to him as a record of the transaction:

"Monmouth Trust & Safe Deposit Co., Asbury Park, N. J.

"A special meeting of the board of directors of this company was held at the office of the company on Monday, Feb. 9th, 1903. "There were present the following directors: George F. Kroebl, S. A. Patterson, G. B. M. Harvey, A. C. Twining, D. C. Corneli. "The minutes of the regular meeting held Jan. 15th, 1903, were read, and on motion duly approved.

"All loans taken since the last meeting were gone over carefully, and, upon motion duly seconded, were unanimously approved.

"A resolution that this company buy 381 shares of the stock of the First National Bank at $44,875 was adopted.

"On motion the meeting adjourned."

This was the paper referred to in the indictment, and it was incumbent on the prosecution to prove that it was false and that it was "knowingly" exhibited by the defendants to the examiner. There was evidence on the part of the prosecution tending to prove both these propositions. The defendants called no witnesses and did not testify themselves, although the law of New Jersey gave them the right to do so if they chose. In his charge to the jury the presiding judge said:

"Now, gentlemen, was this paper false? In the first place,

the paper charged in the indictment certifies in effect that a special meeting of the board of directors of this company was held at the office of the company on Monday, February 9, 1903. There were present the following directors: George F. Kroehl, S. A. Patterson, G. B. M. Harvey, A. C. Twining, D. C. Cornell.

"Among other things, appears a resolution of this company to buy 381 shares of the stock of the First National Bank at $44,875, which was adopted.

"Now, was that meeting held or not?

"That paper says that at this meeting were present, among others, Patterson, Twining and Cornell.

"Mr. Patterson has gone upon the stand and has testified that there was no such meeting to his knowledge; that he was not present at any such meeting; that he had no notice of any such meeting, and that he never acquiesced, as I understand, in any way in the passage of a resolution for the purchase of this stock.

"Now, Twining and Cornell, this paper says, were present. They are here in court and have seen this paper offered in evidence, and they know that this paper says that they were the two men, or two of the men, who were present. Neither of them has gone upon the stand to deny that they were present or to show that the meeting was held.

"Now, it is not necessary for these men to prove their innocence. It is not necessary for them to prove that this meeting was held. But the fact that they stay off the stand, having heard testimony which might be prejudicial to them, without availing themselves of the right to go upon the stand and contradict it, is sometimes a matter of significance.

"Now, of course, in this action, I do not see how that can have much weight, because these men deny that they exhibited the paper, and if one of these men exhibited the paper and the other did not, I do not see how you could say that the person who claims he did not exhibit the paper would be under any obligation at all to go upon the stand. Neither is under any

obligation. It is simply a right they have to go upon the stand, and, consequently the fact that they do not go upon the stand to contradict this statement in the minutes, they both denying, through their counsel and through their plea, that they exhibited the paper, I do not see that that can be taken as at all prejudicial to either of them. They simply have the right to go upon the stand and they have not availed themselves of it, and it may be that there is no necessity for them to go there. I leave that entirely to you."

Further, in that part of the charge, relating to the exhibition of the paper to the examiner, the judge said:

"Now, gentlemen, if you believe that that is so; if you believe this testimony, that Cornell did direct this man's attention to it—Cornell has sat here and heard that testimony and not denied it—nobody could misunderstand the import of that testimony, it was a direct accusation made against him of his guilt—if you believe that testimony beyond a reasonable doubt, Cornell is guilty. And yet he has sat here and not gone upon the stand to deny it. He was not called upon to go upon the stand and deny it, but he did not go upon the stand and deny it, and it is for you to take that into consideration.

"Now Twining has also sat here and heard this testimony, but you will observe there is this distinction as to the conduct of these two men in this respect: the accusation against Cornell was specific by Vreedenberg. It is rather inferential, if at all, against Twining, and he might say—it is for you to say whether he might say, 'Well, I don't think the accusation against me is made with such a degree of certainty as to require me to deny it, and I shall not; nobody will think it strange if I do not go upon the stand to deny it, because Vreedenberg is uncertain as to whether I was there; he won't swear that I was there.' So consequently the fact that Twining did not go upon the stand can have no significance at all.

"You may say that the fact that Cornell did not go upon the stand has no significance. You may say so, because the circumstances may be such that there should be no inference

drawn of guilt or anything of that kind from the fact that he did not go upon the stand. Because a man does not go upon the stand you are not necessarily justified in drawing an inference of guilt. But you have a right to consider the fact that he does not go upon the stand where a direct accusation is made against him."

The question duly brought here by writ of error is, whether the parts of the charge set forth, affirmed as they were by the Court of last resort of the State, are in violation of the Fourteenth Amendment of the Constitution of the United States.

*Mr. John G. Johnson* and *Mr. Marshall Van Winkle*, with whom *Mr. William W. Gooch*, *Mr. Herbert C. Smyth* and *Mr. Frederic C. Scofield* were on the brief, for plaintiffs in error:

Comment by the court upon the failure of the accused to testify was a violation of the fundamental rights of the plaintiff in error and was a denial of due process of law as guaranteed by the Fourteenth Amendment.

In each case the primary inquiry must be as to what is the system of law of the particular State, and whether, according to that law, as adjudged by its courts, the procedure in question is "due process;" and the secondary inquiry must be whether in that process of law if followed, there is any violation of the fundamental rights secured by the Federal Constitution. Guthrie's Fourteenth Amendment, p. 72, citing *Kennard* v. *Louisiana*, 92 U. S. 480, 481; *Caldwell* v. *Texas*, 137 U. S. 692, 698; *Leeper* v. *Texas*, 139 U. S. 462, 469; *McNulty* v. *California*, 149 U. S. 645, 647.

When a statute, harmless on its face, is systematically enforced in violation of fundamental rights, the procedure is not due process of law, and may be declared void and set aside by the courts under the jurisdiction conferred by the Fourteenth Amendment. Guthrie, p. 73, and cases cited.

The State of New Jersey alone permits comment upon the failure of the accused to testify, and bases its action solely upon the absence of any restriction in the qualifying statute,

holding that the accused is thus placed in the same position as any party to a civil suit. *Parker* v. *State*, 61 N. J. L. 308; *State* v. *Wines*, 65 N. J. L. 31; *State* v. *Banusik*, 64 Atl. Rep. 994.

In this connection the decisions of courts of States in the same class with New Jersey (as to statutory provisions on this subject) should be considered. See, therefore, *People* v. *Tyler*, 36 California, 522; *Price* v. *Commonwealth*, 77 Virginia (Ct. of App.), 393; *State* v. *Howard*, 35 S. Car. 202; *Bird* v. *Georgia*, 50 Georgia, 585, 589.

See also, for statutes and decisions of the several States on this subject, Wigmore on Evidence, Vol. 3, § 2272, n. 2, and Vol. 1, § 488. Other cases are: *Wilson* v. *United States*, 149 U. S. 60; *McKnight* v. *United States*, 115 Fed. Rep. 982, 983; *Cooper* v. *State*, 86 Alabama, 610; *People* v. *Cuff*, 122 California, 589; *People* v. *Brown*, 53 California, 66; *People* v. *Streuber*, 121 California, 43; *Quinn* v. *People*, 123 Illinois, 345; *Baker* v. *People*, 105 Illinois, 452; *Austin* v. *People*, 102 Illinois, 261; *Angelo* v. *People*, 96 Illinois, 209; *Miller* v. *People*, 216 Illinois, 309; *Wynehamer* v. *People*, 13 N. Y. 444, 447; *Ruloff* v. *People*, 45 N. Y. 213, 225; *People* v. *Courtney*, 94 N. Y. 492.

Comment by the court upon the failure of the accused to testify was a denial to the plaintiff in error of his privilege and immunity as a citizen of the United States guaranteed by the Fourteenth Amendment, in that he was thus compelled to be a witness against himself in violation of the Fifth Amendment.

Whether or not the Fourteenth Amendment has extended the application of the principle of the Fifth Amendment to the several States is still an open question undecided by this court. *Davidson* v. *New Orleans*, 96 U. S. 104; *The Slaughter-House Cases*, 16 Wall. 36; *Barrington* v. *Missouri*, 205 U. S. 486.

The power of the States to abridge these great rights of citizens can never be conceded until the court shall expressly

so decide in a case involving the exact question, and adequately argued. Guthrie, p. 62.

That this privilege is a fundamental right is shown by the history of the provision contained in the Fifth Amendment. *Bram* v. *United States*, 168 U. S. 543 *et seq.;* 1 Stephen's History of the Criminal Law of England, 440; Story on the Constitution (5th ed.), 1782 and 1788; 2 Story's Commentaries on the Constitution (5th ed.), 697; Cooley's Const. Lim. (6th ed.), 375; *Counselman* v. *Hitchcock*, 142 U. S. 563. See *Boyd* v. *United States*, 116 U. S. 616, holding unconstitutional a statute making the failure of a witness to attend and produce evidence against himself, a confession of guilt.

Here a failure to take the stand is made an admission of guilt.

The compulsion prohibited by the Fifth Amendment is not alone physical or mental duress. *United States* v. *Bell*, 81 Fed. Rep. 837.

No statute, rule or regulation, or act of administration in the given case, can be constitutional, which does not in some way protect the right to be silent if the citizen chooses to be silent. *United States* v. *Bell, supra.*

And as to requiring production of documents which would have been self-incriminating, see *McKnight* v. *United States*, 115 Fed. Rep. 981.

When a State violates a fundamental right of a citizen of the United States, this court will interfere; and the laws of a State come under the prohibition of the Fourteenth Amendment when they infringe fundamental rights. *Ballard* v. *Hunter*, 204 U. S. 262.

The State has full control over the procedure in its courts, both in civil and criminal cases, subject only to the qualification that such procedure must not work a denial of fundamental rights or conflict with specific and applicable provisions of the Federal Constitution. *Brown* v. *New Jersey*, 175 U. S. 175; *West* v. *Louisiana*, 194 U. S. 263; *Rogers* v. *Peck*, 199 U. S. 425; *Gibson* v. *Mississippi*, 162 U. S. 563.

Due process implies, at least, conformity to natural and inherent principles of justice. *Holden* v. *Hardy*, 169 U. S. 366.

In the Fourteenth Amendment, by parity of reasoning, it refers to that law of the land, in each State, which derives its authority from the inherent and reserved powers of the State, exercised within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, and the greatest security for which resides in the right of the people to make their own laws and alter them at their pleasure. *Hurtado* v. *California*, 110 U. S. 516. The purpose of that Amendment is to extend to the citizens and residents of the States the same protection against arbitrary state legislation affecting life, liberty and property as is afforded by the Fifth Amendment against similar legislation by Congress. *Tonawanda* v. *Lyon*, 181 U. S. 392; Guthrie, 2, 3; *Holden* v. *Hardy*, 169 U. S. 366, 389; *O'Neil* v. *Vermont*, 144 U. S. 323, 370.

*Mr. Robert H. McCarter*, Attorney General of the State of New Jersey, and *Mr. H. M. Nevius*, with whom *Mr. Nelson B. Gaskill* was on the brief, for defendant in error:

If the court shall be of the opinion that the charge of the trial court had the effect of violating the privilege against compulsory self-crimination, we answer to the first assignment that it discloses no fundamental right or immunity guaranteed to the plaintiffs in error as citizens of the United States by the Fourteenth Amendment which has been abridged by the decision of the court of last resort of New Jersey.

While it is unquestionably true that there has always been in existence in this country a general government over and among the States, the sole rights secured by constitutional provision prior to the formation of the present Federal Government were those of the citizens of the several States. In these several constitutions, as in that of New Jersey, the inhabitants of each State declared the limitations which were

deemed essential to the protection and preservation of their cherished rights. The powers of the States differ in this respect from the powers of the general government, because, representing the people of the State, each state government exercises those powers against which it is not restrained by the limitations of the state constitution; while the general government, being a government of delegated powers, exercises only those powers which are contained in the provisions of the Federal Constitution. In the rights and restrictions under the state constitutions, therefore, rest the rights of the citizens of the States as such.

When a Federal Government was later formed, a Federal citizenship first came into being, not dependent upon the state constitutions, and not equipped with common-law rights, but dependent upon the essential requisites and provisions of the instrument, the Federal Constitution, which called it into being. The rights of a citizen of the United States may be those of a citizen of any of the States by virtue of the two citizenships existing conjointly in any one person, but they are not necessarily coincident; and the rights of a citizen of the United States are not necessarily those of a citizen of any of the individual States.

The duty of protection to a citizen of a State in his privileges and immunities is not by the Fourteenth Amendment devolved upon the general government, but remains with the State itself where it naturally and properly belongs. Story on the Constitution (5th ed.), par. 1936. See also *Kemmler* v. *United States*, 136 U. S. 448; *Duncan* v. *Missouri*, 152 U. S. 382; *Wadleigh* v. *Newhall*, 136 Fed. Rep. 946.

There is in the Federal Constitution, the source of the rights and immunities of the plaintiffs in error as citizens of the United States, no guarantee of a privilege against compulsory self-crimination which is binding upon the courts of New Jersey, or the abridgment of which by the state courts would give corrective jurisdiction in the Federal Supreme Court.

The only basis for a contrary claim is found in the Fifth

Amendment which, however, is binding only on the Federal Government and its agencies, and is not a limitation upon any of the States. The rights or immunities which it creates, therefore, are rights and immunities against Federal, but not against state interference or abridgment. See *Barron* v. *Baltimore*, 7 Pet. 243, which was reviewed and followed in *Twitchell* v. *The Commonwealth*, 7 Wall. 321; *Walker* v. *Sauvinet*, 92 U. S. 90; *Hallinger* v. *Davis*, 146 U. S. 314; *Holden* v. *Hardy*, 169 U. S. 366; *Munn* v. *Illinois*, 94 U. S. 113; *Kelly* v. *Pittsburg*, 104 U. S. 78; *Nashville* v. *Alabama*, 128 U. S. 96; *Davis* v. *Texas*, 139 U. S. 651.

As plaintiffs in error make no claim to this court as citizens of New Jersey, whatever rights and immunities have been abridged are not a matter of concern to this court unless they can be shown to have had their origin in the Constitution of the United States, or its Amendments, or the necessary requisites thereof. The only right against compulsory self-crimination guaranteed to citizens of the United States is a right and immunity operative in Federal courts, or in any sphere of Federal influence, but there is no such right guaranteed as such to citizens of the United States by the Constitution of the United States or its Amendments, which the State of New Jersey is obliged to consider.

If it be true that the Fourteenth Amendment added to the civil rights of citizens of the United States, the civil rights peculiar to the other citizens of any State in which they might choose to reside, and so far abolished the distinction between citizenship of a State and of the United States, then it is only necessary to inquire into the status of the rights and immunities with reference to the privilege against self-crimination enjoyed by the citizens of the State of New Jersey at the time of the promulgation of the Fourteenth Amendment.

This Amendment created no new civil rights. It merely extended the operation of existing rights, and furnished additional protection to such rights. *Barbier* v. *Connolly*, 113 U. S. 27; *United States* v. *Sanges*, 48 Fed. Rep. 78; *Minor* v. *Hap-*

*persett*, 21 Wall. 171; *United States* v. *Cruikshank*, 92 U. S. 542.

If, therefore, there was added to the civil rights and immunities guaranteed to the plaintiffs in error as citizens of the United States, any additional immunities or rights by virtue of the Fourteenth Amendment, the addition comprises only those rights and immunities which were common to all other citizens of New Jersey in July, 1868, when the Amendment went into effect. And citizens of the United States, resident in New Jersey, could have had at that time no greater rights or immunities than the other citizens of New Jersey enjoyed.

To a citizen of the United States there was at the time of the adoption of the Fourteenth Amendment, no guaranteed privilege or immunity with reference to an alleged error complained of which the courts of New Jersey were bound to recognize, and in the courts of New Jersey as to all persons under their jurisdiction, there was no right or immunity against the submission by a trial court to a jury of the question and matter submitted in this case.

The courts of New Jersey had established at that time the principle of privilege against self-crimination, and had also established as a parallel and not as a contradictory principle, that the question of inference to be raised by the failure to deny a direct criminal accusation when opportunity offered, might properly be submitted to a jury. Plaintiffs in error cannot show the existence of any fundamental right or immunity against compulsory self-crimination, guaranteed by the Fourteenth Amendment, which has been abridged by the courts of New Jersey, as alleged by the pleader in his first assignment of error. On the contrary, the charge in this case was in accordance with the legal recognition of the right of self-crimination as that right existed in New Jersey from the very beginning, and which has not been altered or attempted to be altered since the passage and adoption of the Fourteenth Amendment.

Plaintiffs in error have no just complaint on the basis of any want of due process of law. The Fourteenth Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two States separated only by an imaginary line. Each State prescribes its own modes of judicial proceedings. *Hallinger* v. *Davis*, 146 U. S. 321, citing *Missouri* v. *Lewis*, 101 U. S. 51, and see also *Holden* v. *Hardy*, 169 U. S. 366, 389; *Hurtado* v. *California*, 110 U. S. 535; *Walker* v. *Sauvinet*, 92 U. S. 92.

The Fourteenth Amendment legitimately operates to extend to the citizens and residents of the States the same protection against arbitrary state legislation affecting life, liberty and property, as is offered by the Fifth Amendment against similar legislation by Congress. But the Federal courts ought not to interfere when what is complained of amounts to the enforcement of the laws of a State applicable to all persons in like circumstances and conditions, and the Federal courts should not interfere unless there is some abuse of law amounting to confiscation of property or deprivation of personal rights. 9 Fed. Stat. Ann., 427.

MR. JUSTICE MOODY, after making the foregoing statement, delivered the opinion of the court.

In the view we take of the case we do not deem it necessary to consider whether, with respect to the Federal question, there is any difference in the situation of the two defendants. It is assumed, in respect of each, that the jury were instructed that they might draw an unfavorable inference against him from his failure to testify, where it was within his power, in denial of the evidence which tended to incriminate him. The law of the State, as declared in the case at bar, which accords with other decisions (*Parker* v. *State*, 61 N. J. L. 308; *State* v. *Wines*, 65 N. J. L. 31; *State* v. *Zdanowicz*, 69 N. J. L. 619; *State* v. *Banuski*, 64 Atl. Rep. 994), permitted such an inference to be drawn. The judicial act of the highest court of the

State, in authoritatively construing and enforcing its laws, is the act of the State. *Ex parte Virginia*, 100 U. S. 339; *Scott* v. *McNeal*, 154 U. S. 34; *Chicago, Burlington & Quincy Railroad Company* v. *Chicago*, 166 U. S. 226. The general question, therefore, is, whether such a law violates the Fourteenth Amendment, either by abridging the privileges or immunities of citizens of the United States, or by depriving persons of their life, liberty or property without due process of law. In order to bring themselves within the protection of the Constitution it is incumbent on the defendants to prove two propositions: first, that the exemption from compulsory self-incrimination is guaranteed by the Federal Constitution against impairment by the States; and, second, if it be so guaranteed, that the exemption was in fact impaired in the case at bar. The first proposition naturally presents itself for earlier consideration. If the right here asserted is not a Federal right, that is the end of the case. We have no authority to go further and determine whether the state court has erred in the interpretation and enforcement of its own laws.

The exemption from testimonial compulsion, that is, from disclosure as a witness of evidence against oneself, forced by any form of legal process, is universal in American law, though there may be differences as to its exact scope and limits. At the time of the formation of the Union the principle that no person could be compelled to be a witness against himself had become embodied in the common law and distinguished it from all other systems of jurisprudence. It was generally regarded then, as now, as a privilege of great value, a protection to the innocent though a shelter to the guilty, and a safeguard against heedless, unfounded or tyrannical prosecutions. Five of the original thirteen States (North Carolina, 1776; Pennsylvania, 1776; Virginia, 1776; Massachusetts, 1780; New Hampshire, 1784) had then guarded the principle from legislative or judicial change by including it in constitutions or bills of rights; Maryland had provided in her constitution (1776) that "no man ought to be compelled to give evidence against

himself, in a common court of law, or in any other court, but in such cases as have been usually practiced in this State or may hereafter be directed by the legislature;" and in the remainder of those States there seems to be no doubt that it was recognized by the courts. The privilege was not included in the Federal Constitution as originally adopted, but was placed in one of the ten Amendments which were recommended to the States by the first Congress, and by them adopted. Since then all the States of the Union have, from time to time, with varying form but uniform meaning, included the privilege in their constitutions, except the States of New Jersey and Iowa, and in those States it is held to be part of the existing law. *State* v. *Zdanowicz, supra; State* v. *Height*, 117 Iowa, 650. It is obvious from this short statement that it has been supposed by the States that, so far as the state courts are concerned, the privilege had its origin in the constitutions and laws of the States, and that persons appealing to it must look to the State for their protection. Indeed, since by the unvarying decisions of this court the first ten Amendments of the Federal Constitution are restrictive only of National action, there was nowhere else to look up to the time of the adoption of the Fourteenth Amendment, and the State, at least until then, might give, modify or withhold the privilege at its will. The Fourteenth Amendment withdrew from the States powers theretofore enjoyed by them to an extent not yet fully ascertained, or rather, to speak more accurately, limited those powers and restrained their exercise. There is no doubt of the duty of this court to enforce the limitations and restraints whenever they exist, and there has been no hesitation in the performance of the duty. But whenever a new limitation or restriction is declared it is a matter of grave import, since, to that extent, it diminishes the authority of the State, so necessary to the perpetuity of our dual form of government, and changes its relation to its people and to the Union. The question in the case at bar has been twice before us, and been left undecided, as the cases were disposed of on other grounds. *Adams* v. *New*

*York*, 192 U. S. 585; *Consolidated Rendering Co.* v. *Vermont*, 207 U. S. 541. The defendants contend, in the first place, that the exemption from self-incrimination is one of the privileges and immunities of citizens of the United States which the Fourteenth Amendment forbids the States to abridge. It is not argued that the defendants are protected by that part of the Fifth Amendment which provides that "no person . . . shall be compelled in any criminal case to be a witness against himself," for it is recognized by counsel that by a long line of decisions the first ten Amendments are not operative on the States. *Barron* v. *Baltimore*, 7 Pet. 243; *Spies* v. *Illinois*, 123 U. S. 131; *Brown* v. *New Jersey*, 175 U. S. 172; *Barrington* v. *Missouri*, 205 U. S. 483. But it is argued that this privilege is one of the fundamental rights of National citizenship, placed under National protection by the Fourteenth Amendment, and it is specifically argued that the "privileges and immunities of citizens of the United States," protected against state action by that Amendment, include those fundamental personal rights which were protected against National action by the first eight Amendments; that this was the intention of the framers of the Fourteenth Amendment, and that this part of it would otherwise have little or no meaning and effect. These arguments are not new to this court and the answer to them is found in its decisions. The meaning of the phrase "privileges and immunities of citizens of the United States," as used in the Fourteenth Amendment, came under early consideration in the *Slaughter-House Cases*, 16 Wall. 36. A statute of Louisiana created a corporation and conferred upon it the exclusive privilege, for a term of years, of establishing and maintaining within a fixed division of the city of New Orleans stock-yards and slaughter-houses. The act provided that others might use these facilities for a prescribed price, forbade the landing for slaughter or the slaughtering of animals elsewhere or otherwise, and established a system of inspection. Those persons who were driven out of independent business by this law denied its validity in suits which came to this

court by writs of error to the Supreme Court of the State which had sustained the act. It was argued, *inter alia*, that the statute abridged the privileges and immunities of the plaintiffs in error as citizens of the United States, and the particular privilege which was alleged to be violated was that of pursuing freely their chosen trade, business or calling. The majority of the court were not content with expressing the opinion that the act did not in fact deprive the plaintiffs in error of their right to exercise their trade (a proposition vigorously disputed by four dissenting justices), which would have disposed of the case, but preferred to rest the decision upon the broad ground that the right asserted in the case was not a privilege or immunity belonging to persons by virtue of their National citizenship, but, if existing at all, belonging to them only by virtue of their state citizenship. The Fourteenth Amendment, it is observed by Mr. Justice Miller, delivering the opinion of the court, removed the doubt whether there could be a citizenship of the United States independent of citizenship of the State, by recognizing or creating and defining the former. "It is quite clear, then," he proceeds to say (p. 74), "that there is a citizenship of the United States and a citizenship of a State, which are distinct from each other, and which depend upon different characteristics or circumstances in the individual." The description of the privileges and immunities of state citizenship, given by Mr. Justice Washington in *Corfield* v. *Coryell*, 4 Wash. C. C. 371, is then quoted, approved and (p. 76) said to include "those rights which are fundamental," to embrace "nearly every civil right for the establishment and protection of which organized government is instituted," and "to be the class of rights which the state governments were created to establish and secure." This part of the opinion then concludes with the holding that the rights relied upon in the case are those which belong to the citizens of States as such and are under the sole care and protection of the state governments. The conclusion is preceded by the important declaration that the civil rights theretofore appertaining to citizenship of the States

and under the protection of the States, were not given the security of National protection by this clause of the Fourteenth Amendment. The exact scope and the momentous consequence of this decision are brought into clear light by the dissenting opinions. The view of Mr. Justice Field, concurred in by Chief Justice Chase and Justices Swayne and Bradley, was that the fundamental rights of citizenship, which by the opinion of the court were held to be rights of state citizenship, protected only by the state government, became, as the result of the Fourteenth Amendment, rights of National citizenship protected by the National Constitution. Said Mr. Justice Field (p. 95):

"The fundamental rights, privileges and immunities which belong to him as a free man and a free citizen, now belong to him as a citizen of the United States, and are not dependent upon his citizenship of any State. . . . The Amendment does not attempt to confer any new privileges or immunities upon citizens, or to enumerate or define those already existing. It assumes that there are such privileges and immunities which belong of right to citizens as such, and ordains that they shall not be abridged by state legislation. If this inhibition has no reference to privileges and immunities of this character, but only refers, as held by the majority of the court in their opinion, to such privileges and immunities as were before its adoption specially designated in the Constitution or necessarily implied as belonging to citizens of the United States, it was a vain and idle enactment, which accomplished nothing, and most unnecessarily excited Congress and the people on its passage. With privileges and immunities thus designated or implied no State could ever have interfered by its laws, and no new constitutional provision was required to inhibit such interference. The supremacy of the Constitution and laws of the United States always controlled any state legislation of that character. But if the Amendment refers to the natural and inalienable rights which belong to all citizens, the inhibition has a profound significance and consequence."

In accordance with these principles it is said by the learned justice that the privileges and immunities of state citizenship described by Mr. Justice Washington, and held by the majority of the court still to pertain exclusively to state citizenship and to be protected solely by the state government, have been guaranteed by the Fourteenth Amendment as privileges and immunities of citizens of the United States. And see the concurring opinions of Mr. Justice Field and Mr. Justice Bradley in *Bartemeyer* v. *Iowa*, 18 Wall. 129, and in *Butchers' Union Company* v. *Crescent City Company*, 111 U. S. 746. There can be no doubt, so far as the decision in the *Slaughter-House Cases* has determined the question, that the civil rights sometimes described as fundamental and inalienable, which before the war Amendments were enjoyed by state citizenship and protected by state government, were left untouched by this clause of the Fourteenth Amendment. Criticism of this case has never entirely ceased, nor has it ever received universal assent by members of this court. Undoubtedly, it gave much less effect to the Fourteenth Amendment than some of the public men active in framing it intended, and disappointed many others. On the other hand, if the views of the minority had prevailed it is easy to see how far the authority and independence of the States would have been diminished, by subjecting all their legislative and judicial acts to correction by the legislative and review by the judicial branch of the National Government. But we need not now inquire into the merits of the original dispute. This part at least of the *Slaughter-House Cases* has been steadily adhered to by this court, so that it was said of it, in a case where the same clause of the Amendment was under consideration (*Maxwell* v. *Dow*, 176 U. S. 581, 591), "The opinion upon the matters actually involved and maintained by the judgment in the case has never been doubted or overruled by any judgment of this court." The distinction between National and state citizenship and their respective privileges there drawn has come to be firmly established. And so it was held that the right of peaceable assem-

bly for a lawful purpose (it not appearing that the purpose had any reference to the National Government) was not a right secured by the Constitution of the United States, although it was said that the right existed before the adoption of the Constitution of the United States, and that "it is and always has been one of the attributes of citizenship under a free government." *United States* v. *Cruikshank*, 92 U. S. 542, 551. And see *Hodges* v. *United States*, 203 U. S. 1. In each case the *Slaughter-House Cases* were cited by the court, and in the latter case the rights described by Mr. Justice Washington were again treated as rights of state citizenship under state protection. If then it be assumed, without deciding the point, that an exemption from compulsory self-incrimination is what is described as a fundamental right belonging to all who live under a free government, and incapable of impairment by legislation or judicial decision, it is, so far as the States are concerned, a fundamental right inherent in state citizenship, and is a privilege or immunity of that citizenship only. Privileges and immunities of citizens of the United States, on the other hand, are only such as arise out of the nature and essential character of the National Government, or are specifically granted or secured to all citizens or persons by the Constitution of the United States. *Slaughter-House Cases*, *supra*, p. 79; *In re Kemmler*, 136 U. S. 436, 448; *Duncan* v. *Missouri*, 152 U. S. 377, 382.

Thus among the rights and privileges of National citizenship recognized by this court are the right to pass freely from State to State, *Crandall* v. *Nevada*, 6 Wall. 35; the right to petition Congress for a redress of grievances, *United States* v. *Cruikshank*, *supra;* the right to vote for National officers, *Ex parte Yarbrough*, 110 U. S. 651; *Wiley* v. *Sinkler*, 179 U. S. 58; the right to enter the public lands, *United States* v. *Waddell*, 112 U. S. 76; the right to be protected against violence while in the lawful custody of a United States marshal, *Logan* v. *United States*, 144 U. S. 263; and the right to inform the United States authorities of violation of its laws, *In re Quarles*, 158 U. S. 532.



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Most of these cases were indictments against individuals for conspiracies to deprive persons of rights secured by the Constitution of the United States, and met with a different fate in this court from the indictments in *United States* v. *Cruikshank* and *Hodges* v. *United States*, because the rights in the latter cases were rights of state and not of National citizenship. But assuming it to be true that the exemption from self-incrimination is not, as a fundamental right of National citizenship, included in the privileges and immunities of citizens of the United States, counsel insist that, as a right specifically granted or secured by the Federal Constitution, it is included in them. This view is based upon the contention which must now be examined, that the safeguards of personal rights which are enumerated in the first eight Articles of amendment to the Federal Constitution, sometimes called the Federal Bill of Rights, though they were by those Amendments originally secured only against National action, are among the privileges and immunities of citizens of the United States, which this clause of the Fourteenth Amendment protects against state action. This view has been, at different times, expressed by justices of this court (Mr. Justice Field in *O'Niel* v. *Vermont*, 144 U. S. 323, 361; Mr. Justice Harlan in the same case, 370, and in *Maxwell* v. *Dow*, 176 U. S. 606, 617), and was undoubtedly that entertained by some of those who framed the Amendment. It is, however, not profitable to examine the weighty arguments in its favor, for the question is no longer open in this court. The right of trial by jury in civil cases, guaranteed by the Seventh Amendment (*Walker* v. *Sauvinet*, 92 U. S. 90), and the right to bear arms guaranteed by the Second Amendment (*Presser* v. *Illinois*, 116 U. S. 252), have been distinctly held not to be privileges and immunities of citizens of the United States guaranteed by the Fourteenth Amendment against abridgment by the States, and in effect the same decision was made in respect of the guarantee against prosecution, except by indictment of a grand jury, contained in the Fifth Amendment (*Hurtado* v. *California*, 110 U. S. 516),

and in respect of the right to be confronted with witnesses, contained in the Sixth Amendment. *West* v. *Louisiana*, 194 U. S. 258. In *Maxwell* v. *Dow*, *supra*, where the plaintiff in error had been convicted in a state court of a felony upon an information, and by a jury of eight persons, it was held that the indictment, made indispensable by the Fifth Amendment, and the trial by jury guaranteed by the Sixth Amendment, were not privileges and immunities of citizens of the United States, as those words were used in the Fourteenth Amendment. The discussion in that case ought not to be repeated. All the arguments for the other view were considered and answered, the authorities were examined and analyzed, and the decision rested upon the ground that this clause of the Fourteenth Amendment did not forbid the States to abridge the personal rights enumerated in the first eight Amendments, because those rights were not within the meaning of the clause "privileges and immunities of citizens of the United States." If it be possible to render the principle which governed the decision more clear, it is done so by the dissent of Mr. Justice Harlan. We conclude, therefore, that the exemption from compulsory self-incrimination is not a privilege or immunity of National citizenship guaranteed by this clause of the Fourteenth Amendment against abridgment by the States.

The defendants, however, do not stop here. They appeal to another clause of the Fourteenth Amendment, and insist that the self-incrimination, which they allege the instruction to the jury compelled, was a denial of due process of law. This contention requires separate consideration, for it is possible that some of the personal rights safeguarded by the first eight Amendments against National action may also be safeguarded against state action, because a denial of them would be a denial of due process of law. *Chicago, Burlington & Quincy Railroad* v. *Chicago*, 166 U. S. 226. If this is so, it is not because those rights are enumerated in the first eight Amendments, but because they are of such a nature that they are included in the conception of due process of law. Few

phrases of the law are so elusive of exact apprehension as this. Doubtless the difficulties of ascertaining its connotation have been increased in American jurisprudence, where it has been embodied in constitutions and put to new uses as a limit on legislative power. This court has always declined to give a comprehensive definition of it, and has preferred that its full meaning should be gradually ascertained by the process of inclusion and exclusion in the course of the decisions of cases as they arise. There are certain general principles well settled, however, which narrow the field of discussion and may serve as helps to correct conclusions. These principles grow out of the proposition universally accepted by American courts on the authority of Coke, that the words "due process of law" are equivalent in meaning to the words "law of the land," contained in that chapter of Magna Carta, which provides that "no freeman shall be taken, or imprisoned, or disseised, or outlawed, or exiled, or any wise destroyed; nor shall we go upon him, nor send upon him, but by the lawful judgment of his peers or by the law of the land." *Murray* v. *Hoboken Land Co.*, 18 How. 272; *Davidson* v. *New Orleans*, 96 U. S. 97; *Jones* v. *Robbins*, 8 Gray, 329; Cooley, Const. Lim. (7th ed.), 500; McGehee, Due Process of Law, 16. From the consideration of the meaning of the words in the light of their historical origin this court has drawn the following conclusions:

First. What is due process of law may be ascertained by an examination of those settled usages and modes of proceedings existing in the common and statute law of England before the emigration of our ancestors, and shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country. This test was adopted by the court, speaking through Mr. Justice Curtis, in *Murray* v. *Hoboken Land Co.*, 18 How. 272, 280 (approved in *Hallinger* v. *Davis*, 146 U. S. 314, 320; *Holden* v. *Hardy*, 169 U. S. 366, 390, but see *Lowe* v. *Kansas*, 163 U. S. 81, 85). Of course, the part of the Constitution then

before the court was the Fifth Amendment. If any different meaning of the same words, as they are used in the Fourteenth Amendment, can be conceived, none has yet appeared in judicial decision. "A process of law," said Mr. Justice Matthews, commenting on this statement of Mr. Justice Curtis, "which is not otherwise forbidden, must be taken to be due process of law, if it can show the sanction of settled usage both in England and this country." *Hurtado* v. *California*, 110 U. S. 516, 528.

Second. It does not follow, however, that a procedure settled in English law at the time of the emigration, and brought to this country and practiced by our ancestors, is an essential element of due process of law. If that were so the procedure of the first half of the seventeenth century would be fastened upon the American jurisprudence like a straight-jacket, only to be unloosed by constitutional amendment. That, said Mr. Justice Matthews, in the same case, p. 529, "would be to deny every quality of the law but its age, and to render it incapable of progress or improvement." *Holden* v. *Hardy*, 169 U. S. 366, 388; *Brown* v. *New Jersey*, 175 U. S. 172, 175.

Third. But, consistently with the requirements of due process, no change in ancient procedure can be made which disregards those fundamental principles, to be ascertained from time to time by judicial action, which have relation to process of law and protect the citizen in his private right, and guard him against the arbitrary action of government. This idea has been many times expressed in differing words by this court, and it seems well to cite some expressions of it. The words due process of law "were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice." *Bank of Columbia* v. *Okely*, 4 Wh. 235, 244 (approved in *Hurtado* v. *California*, 110 U. S. 516, 527; *Leeper* v. *Texas*, 139 U. S. 462, 468; *Scott* v. *McNeal*, 154 U. S. 34, 45). "This court has never attempted to define

with precision the words 'due process of law.' . . . It is sufficient to say that there are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard." *Holden* v. *Hardy*, 169 U. S. 366, 389. "The same words refer to that law of the land in each State, which derives its authority from the inherent and reserved powers of the State, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." *In re Kemmler*, 136 U. S. 436, 448. "The limit of the full control which the State has in the proceedings of its courts, both in civil and criminal cases, is subject only to the qualification that such procedure must not work a denial of fundamental rights or conflict with specific and applicable provisions of the Federal Constitution." *West* v. *Louisiana*, 194 U. S. 258, 263.

The question under consideration may first be tested by the application of these settled doctrines of this court. If the statement of Mr. Justice Curtis, as elucidated in *Hurtado* v. *California*, is to be taken literally, that alone might almost be decisive. For nothing is more certain, in point of historical fact, than that the practice of compulsory self-incrimination in the courts and elsewhere existed for four hundred years after the granting of Magna Carta, continued throughout the reign of Charles I (though then beginning to be seriously questioned), gained at least some foothold among the early colonists of this country, and was not entirely omitted at trials in England until the eighteenth century. Wigmore on Evidence, § 2250 (see for the Colonies, note 108); Hallam's Constitutional History of England, ch. VIII, 2 Widdleton's American ed., 37 (describing the criminal jurisdiction of the Court of Star Chamber); Bentham's Rationale of Judicial Evidence, book IX, ch. III, § IV.

Sir James Fitzjames Stephen, in his studies of the reports of English trials for crime, has thrown much light on the existence of the practice of questioning persons accused of

crime and its gradual decay. He considers, first, a group of trials which occurred between 1554 and 1637. Speaking of the trial before the jury, he says:

"The prisoner, in nearly every instance, asked, as a favor, that he might not be overpowered by the eloquence of counsel denouncing him in a set speech, but, in consideration of the weakness of his memory, might be allowed to answer separately to the different matters which might be alleged against him. This was usually granted, and the result was that the trial became a series of excited altercations between the prisoner and the different counsel opposed to him. Every statement of counsel operated as a question to the prisoner, and indeed they were constantly thrown into the form of questions, the prisoner either admitting or denying or explaining what was alleged against him. The result was that, during the period in question, the examination of the prisoner, which is at present scrupulously and I think even pedantically avoided, was the very essence of the trial, and his answers regulated the production of the evidence; the whole trial, in fact, was a long argument between the prisoner and counsel for the Crown, in which they questioned each other and grappled with each other's arguments with the utmost eagerness and closeness of reasoning." Stephen, 1 Hist. of the Crim. Law, 325.

This description of the questioning of the accused and the meeting of contending arguments finds curious confirmation in the report of the trial, in 1637, of Ann Hutchinson (which resulted in banishment), for holding and encouraging certain theological views which were not approved by the majority of the early Massachusetts rulers. 1 Hart's American History Told by Contemporaries, 382. The trial was presided over and the examination very largely conducted by Governor Winthrop, who had been for some years before his emigration an active lawyer and admitted to the Inner Temple. An examination of the report of this trial will show that he was not aware of any privilege against self-incrimination or conscious of

any duty to respect it. Stephen says of the trials between 1640 and 1660 (*Ib.*, 358): "In some cases the prisoner was questioned, but never to any greater extent than that which it is practically impossible to avoid when a man has to defend himself without counsel. When so questioned the prisoners usually refused to answer." He further says (*Ib.*, 440): "Soon after the Revolution of 1688 the practice of questioning the prisoner died out." But committing magistrates were authorized to take the examination of persons suspected, which if not under oath, was admissible against him on his trial, until by the 11 & 12 Vict., ch. 2, the prisoner was given the option whether he would speak, and warned that what he said might be used against him. But even now there seems to be a very well-recognized and important exception in English law to the rule that no person can be compelled to furnish evidence against himself. A practice in bankruptcy has existed from ancient times, and still exists, which would not be constitutionally possible under our national bankruptcy law or under the insolvency law of any State whose constitution contains the customary prohibition of compulsory self-incrimination. The Bankruptcy Act of 1 James I, ch. 15, § 7 (1603), authorized the commissioners of bankruptcy to compel, by commitment if necessary, the bankrupt to submit to an examination touching his estate and dealings. The provision was continued in the subsequent acts, and in 1820, in *Ex parte Cossens*, Buck, Bkcy. Cases, 531, 540, Lord Eldon, in the course of a discussion of the right to examine a bankrupt, held that he could be compelled to disclose his violations of law in respect of his trade and estate, and, while recognizing the general principle of English law, that no one could be compelled to incriminate himself, said: "I have always understood the proposition to admit of a qualification with respect to the jurisdiction in bankruptcy." The act of 6 Geo. IV, ch. 16, § 36 (1825), authorized the compulsory examination of the bankrupt "touching all matters relating either to his trade, dealings, or estate, or which may tend to disclose any

secret grant, conveyance or concealment of his lands." The act of 12 & 13 Vict., ch. 106, § 117 (1849), contained the same provision. Construing these acts, it was held that the bankrupt must answer, though his answer might furnish evidence of his crime, and even if an indictment were pending against him, and that the evidence thus compelled was admissible on his trial for crime. *Re Heath*, 2 D. & Ch. 214; *Re Smith*, 2 D. & Ch. 230, 235; *Reg.* v. *Scott*, Dearsley & Bell, 47; *Reg.* v. *Cross*, 7 Cox C. C. 226; *Reg.* v. *Widdop*, L. R. 2 C. C. R. 3. The act of 46 & 47 Vict., ch. 52, § 17 (1883), which we understand to be (with some amendment not material here) the present law, passed after the decisions cited, expressly provided that the examination shall be taken in writing and signed by the debtor, "and may thereafter be used in evidence against him." It has since been held that other evidence of his testimony than that written and signed by him may be used. *Reg.* v. *Erdheim* (1896), 2 Q. B. D. 260, and see *Rex* v. *Pike* (1902), 1 K. B. 552.[1] It is to be observed that not until 1883 did Parliament, which has an unlimited legislative power, expressly provide that the evidence compelled from the bankrupt could be used in proof of an indictment against him. The rule had been previously firmly established by judicial decisions upon statutes simply authorizing a compulsory examination. If the rule had been thought to be in conflict with "the law of the land" of Magna Carta, "a sacred text, the nearest approach to an irrepealable, 'fundamental statute' that England has ever had," 1 Pollock & Maitland, 152, it is inconceivable that such a consideration would not have received some attention from counsel and judges. We think it is manifest, from this review of the origin, growth, extent and limits of the exemption from compulsory self-incrimination in the English law, that it is not regarded as a part of the law of the land of Magna Carta or the due process of law, which

[1] In certain offenses, which may be generally described as embezzlements, the evidence compelled from a bankrupt cannot be used against him. 24 & 25 Vict., ch. 96, § 85; 53 & 54 Vict., ch. 71, § 27.

has been deemed an equivalent expression, but, on the contrary, is regarded as separate from and independent of due process. It came into existence not as an essential part of due process, but as a wise and beneficent rule of evidence developed in the course of judicial decision. This is a potent argument when it is remembered that the phrase was borrowed from English law and that to that law we must look at least for its primary meaning.

But without repudiating or questioning the test proposed by Mr. Justice Curtis for the court, or rejecting the inference drawn from English law, we prefer to rest our decision on broader grounds, and inquire whether the exemption from self-incrimination is of such a nature that it must be included in the conception of due process. Is it a fundamental principle of liberty and justice which inheres in the very idea of free government and is the inalienable right of a citizen of such a government? If it is, and if it is of a nature that pertains to process of law, this court has declared it to be essential to due process of law. In approaching such a question it must not be forgotten that in a free representative government nothing is more fundamental than the right of the people through their appointed servants to govern themselves in accordance with their own will, except so far as they have restrained themselves by constitutional limits specifically established, and that in our peculiar dual form of government nothing is more fundamental than the full power of the State to order its own affairs and govern its own people, except so far as the Federal Constitution expressly or by fair implication has withdrawn that power. The power of the people of the States to make and alter their laws at pleasure is the greatest security for liberty and justice, this court has said in *Hurtado* v. *California, supra*. We are not invested with the jurisdiction to pass upon the expediency, wisdom or justice of the laws of the States as declared by their courts, but only to determine their conformity with the Federal Constitution and the paramount laws enacted pursuant to it. Under the guise of interpreting the Constitution we must

take care that we do not import into the discussion our own personal views of what would be wise, just and fitting rules of government to be adopted by a free people and confound them with constitutional limitations. The question before us is the meaning of a constitutional provision which forbids the States to deny to any person due process of law. In the decision of this question we have the authority to take into account only those fundamental rights which are expressed in that provision, not the rights fundamental in citizenship, state or National, for they are secured otherwise, but the rights fundamental in due process, and therefore an essential part of it. We have to consider whether the right is so fundamental in due process that a refusal of the right is a denial of due process. One aid to the solution of the question is to inquire how the right was rated during the time when the meaning of due process was in a formative state and before it was incorporated in American constitutional law. Did those who then were formulating and insisting upon the rights of the people entertain the view that the right was so fundamental that there could be no due process without it? It has already appeared that, prior to the formation of the American Constitutions, in which the exemption from compulsory self-incrimination was specifically secured, separately, independently, and side by side with the requirement of due process, the doctrine was formed, as other doctrines of the law of evidence have been formed, by the course of decision in the courts covering a long period of time. Searching further, we find nothing to show that it was then thought to be other than a just and useful principle of law. None of the great instruments in which we are accustomed to look for the declaration of the fundamental rights made reference to it. The privilege was not dreamed of for hundreds of years after Magna Carta (1215), and could not have been implied in the "law of the land" there secured. The Petition of Right (1629), though it insists upon the right secured by Magna Carta to be condemned only by the law of the land, and sets forth by way of grievance divers violations of

it, is silent upon the practice of compulsory self-incrimination, though it was then a matter of common occurrence in all the courts of the realm. The Bill of Rights of the first year of the reign of William and Mary (1689) is likewise silent, though the practice of questioning the prisoner at his trial had not then ceased. The negative argument which arises out of the omission of all reference to any exemption from compulsory self-incrimination in these three great declarations of English liberty (though it is not supposed to amount to a demonstration) is supported by the positive argument that the English Courts and Parliaments, as we have seen, have dealt with the exemption as they would have dealt with any other rule of evidence, apparently without a thought that the question was affected by the law of the land of Magna Carta, or the due process of law which is its equivalent.

We pass by the meager records of the early colonial time, so far as they have come to our attention, as affording light too uncertain for guidance. See Wigmore, § 2250, note 108; 2 Hennings St. at Large, 422 (Va., 1677); 1 Winthrop's History of New England, 47, Provincial Act, 4 W. & M. Ancient Charters, Massachusetts, 214. Though it is worthy of note that neither the declaration of rights of the Stamp Act Congress (1765) nor the declaration of rights of the Continental Congress (1774) nor the ordinance for the government of the Northwestern Territory included the privilege in their enumeration of fundamental rights.

But the history of the incorporation of the privilege in an amendment to the National Constitution is full of significance in this connection. Five States, Delaware, Pennsylvania, New Jersey, Georgia and Connecticut, ratified the Constitution without proposing amendments. Massachusetts then followed with a ratification, accompanied by a recommendation of nine amendments, none of which referred to the privilege; Maryland with a ratification without proposing amendments; South Carolina with a ratification accompanied by a recommendation of four amendments, none of which referred to the privilege,

and New Hampshire with a ratification accompanied by a recommendation of twelve amendments, none of which referred to the privilege. The nine States requisite to put the Constitution in operation ratified it without a suggestion of incorporating this privilege. Virginia was the tenth State to ratify, proposing, by separate resolution, an elaborate Bill of Rights under twenty heads, and in addition twenty amendments to the body of the Constitution. Among the rights enumerated as "essential and inalienable" is that no man "can be compelled to give evidence against himself," and "no freeman ought to be deprived of his life, liberty or property but by the law of the land." New York ratified with a proposal of numerous amendments and a declaration of rights which the convention declared could not be violated and were consistent with the Constitution. One of these rights was that "No person ought to be taken, imprisoned or deprived of his freehold, or be exiled or deprived of his privileges, franchises, life, liberty or property but by due process of law;" and another was that "in all criminal prosecutions the accused . . . should not be compelled to give evidence against himself." North Carolina and Rhode Island were the last to ratify, each proposing a large number of amendments, including the provision that no man "can be compelled to give evidence against himself;" and North Carolina, that "no freeman ought to be . . . deprived of his life, liberty or property but by the law of the land;" and Rhode Island, that "no freeman ought to be . . . deprived of his life, liberty or property but by the trial by jury, or by the law of the land."

Thus it appears that four only of the thirteen original States insisted upon incorporating the privilege in the Constitution, and they separately and simultaneously with the requirement of due process of law, and that three States proposing amendments were silent upon this subject. It is worthy of note that two of these four States did not incorporate the privilege in their own constitutions, where it would have had a much wider field of usefulness, until many years after. New York

in 1821 and Rhode Island in 1842 (its first constitution). This survey does not tend to show that it was then in this country the universal or even general belief that the privilege ranked among the fundamental and inalienable rights of mankind; and what is more important here, it affirmatively shows that the privilege was not conceived to be inherent in due process of law, but on the other hand a right separate, independent and outside of due process. Congress, in submitting the amendments to the several States, treated the two rights as exclusive of each other. Such also has been the view of the States in framing their own constitutions, for in every case, except in New Jersey and Iowa, where the due process clause or its equivalent is included, it has been thought necessary to include separately the privilege clause. Nor have we been referred to any decision of a state court save one (*State* v. *Height*, 117 Iowa, 650), where the exemption has been held to be required by due process of law. The inference is irresistible that it has been the opinion of constitution makers that the privilege, if fundamental in any sense, is not fundamental in due process of law, nor an essential part of it. We believe that this opinion is proved to have been correct by every historical test by which the meaning of the phrase can be tried.

The decisions of this court, though they are silent on the precise question before us, ought to be searched to discover if they present any analogies which are helpful in its decision. The essential elements of due process of law, already established by them, are singularly few, though of wide application and deep significance. We are not here concerned with the effect of due process in restraining substantive laws, as, for example, that which forbids the taking of private property for public use without compensation. We need notice now only those cases which deal with the principles which must be observed in the trial of criminal and civil causes. Due process requires that the court which assumes to determine the rights of parties shall have jurisdiction, *Pennoyer* v. *Neff*, 95 U. S. 714, 733; *Scott* v. *McNeal*, 154 U. S. 34; *Old Wayne Life Association*

v. *McDonough*, 204 U. S. 8, and that there shall be notice and opportunity for hearing given the parties, *Hovey* v. *Elliott*, 167 U. S. 409; *Roller* v. *Holly*, 176 U. S. 398; and see *Londoner* v. *Denver*, 210 U. S. 373. Subject to these two fundamental conditions, which seem to be universally prescribed in all systems of law established by civilized countries, this court has up to this time sustained all state laws, statutory or judicially declared, regulating procedure, evidence and methods of trial, and held them to be consistent with due process of law. *Walker* v. *Sauvinet*, 92 U. S. 90; *Re Converse*, 137 U. S. 624; *Caldwell* v. *Texas*, 137 U. S. 692; *Leeper* v. *Texas*, 139 U. S. 462; *Hallinger* v. *Davis*, 146 U. S. 314; *McNulty* v. *California*, 149 U. S. 645; *McKane* v. *Durston*, 153 U. S. 684; *Iowa Central* v. *Iowa*, 160 U. S. 389; *Lowe* v. *Kansas*, 163 U. S. 81; *Allen* v. *Georgia*, 166 U. S. 138; *Hodgson* v. *Vermont*, 168 U. S. 262; *Brown* v. *New Jersey*, 175 U. S. 172; *Bolln* v. *Nebraska*, 176 U. S. 83; *Maxwell* v. *Dow*, 176 U. S. 581; *Simon* v. *Craft*, 182 U. S. 427; *West* v. *Louisiana*, 194 U. S. 258; *Marvin* v. *Trout*, 199 U. S. 212; *Rogers* v. *Peck*, 199 U. S. 425; *Howard* v. *Kentucky*, 200 U. S. 164; *Rawlins* v. *Georgia*, 201 U. S. 638; *Felts* v. *Murphy*, 201 U. S. 123.

Among the most notable of these decisions are those sustaining the denial of jury trial both in civil and criminal cases, the substitution of informations for indictments by a grand jury, the enactment that the possession of policy slips raises a presumption of illegality, and the admission of the deposition of an absent witness in a criminal case. The cases proceed upon the theory that, given a court of justice which has jurisdiction and acts, not arbitrarily but in conformity with a general law, upon evidence, and after inquiry made with notice to the parties affected and opportunity to be heard, then all the requirements of due process, so far as it relates to procedure in court and methods of trial and character and effect of evidence, are complied with. Thus it was said in *Iowa Central* v. *Iowa*, 160 U. S. 393: "But it is clear that the Fourteenth Amendment in no way undertakes to control the

power of the State to determine by what process legal rights may be asserted or legal obligations be enforced, provided the method of procedure adopted gives reasonable notice and affords fair opportunity to be heard before the issues are decided;" and in *Louisville & Nashville Railroad Company* v. *Schmidt*, 177 U. S. 230, 236: "It is no longer open to contention that the due process clause of the Fourteenth Amendment to the Constitution of the United States does not control mere forms of procedure in state courts or regulate practice therein. All its requirements are complied with, provided in the proceedings which are claimed not to have been due process of law the person condemned has had sufficient notice and adequate opportunity has been afforded him to defend;" and in *Hooker* v. *Los Angeles*, 188 U. S. 314, 318: "The Fourteenth Amendment does not control the power of a State to determine the form of procedure by which legal rights may be ascertained, if the method adopted gives reasonable notice and affords a fair opportunity to be heard;" and in *Rogers* v. *Peck*, 199 U. S. 435: "Due process of law, guaranteed by the Fourteenth Amendment, does not require the State to adopt a particular form of procedure, so long as it appears that the accused has had sufficient notice of the accusation and an adequate opportunity to defend himself in the prosecution." It is impossible to reconcile the reasoning of these cases and the rule which governed their decision with the theory that an exemption from compulsory self-incrimination is included in the conception of due process of law. Indeed the reasoning for including indictment by a grand jury and trial by a petit jury in that conception, which has been rejected by this court in *Hurtado* v. *California* and *Maxwell* v. *Dow*, was historically and in principle much stronger. Clearly appreciating this, Mr. Justice Harlan, in his dissent in each of these cases, pointed out that the inexorable logic of the reasoning of the court was to allow the States, so far as the Federal Constitution was concerned, to compel any person to be a witness against himself. In *Missouri* v. *Lewis*, 101 U. S. 22, Mr. Justice Bradley, speaking

for the whole court, said, in effect, that the Fourteenth Amendment would not prevent a State from adopting or continuing the civil law instead of the common law. This *dictum* has been approved and made an essential part of the reasoning of the decision in *Holden* v. *Hardy*, 169 U. S. 387, 389, and *Maxwell* v. *Dow*, 176 U. S. 598. The statement excludes the possibility that the privilege is essential to due process, for it hardly need be said that the interrogation of the accused at his trial is the practice in the civil law.

Even if the historical meaning of due process of law and the decisions of this court did not exclude the privilege from it, it would be going far to rate it as an immutable principle of justice which is the inalienable possession of every citizen of a free government. Salutary as the principle may seem to the great majority, it cannot be ranked with the right to hearing before condemnation, the immunity from arbitrary power not acting by general laws, and the inviolability of private property. The wisdom of the exemption has never been universally assented to since the days of Bentham; many doubt it to-day, and it is best defended not as an unchangeable principle of universal justice but as a law proved by experience to be expedient. See Wigmore, § 2251. It has no place in the jurisprudence of civilized and free countries outside the domain of the common law, and it is nowhere observed among our own people in the search for truth outside the administration of the law. It should, must and will be rigidly observed where it is secured by specific constitutional safeguards, but there is nothing in it which gives it a sanctity above and before constitutions themselves. Much might be said in favor of the view that the privilege was guaranteed against state impairment as a privilege and immunity of National citizenship, but, as has been shown, the decisions of this court have foreclosed that view. There seems to be no reason whatever, however, for straining the meaning of due process of law to include this privilege within it, because, perhaps, we may think it of great value. The States had guarded the privilege

to the satisfaction of their own people up to the adoption of the Fourteenth Amendment. No reason is perceived why they cannot continue to do so. The power of their people ought not to be fettered, their sense of responsibility lessened, and their capacity for sober and restrained self-government weakened by forced construction of the Federal Constitution. If the people of New Jersey are not content with the law as declared in repeated decisions of their courts, the remedy is in their own hands. They may, if they choose, alter it by legislation, as the people of Maine did when the courts of that State made the same ruling. *State* v. *Bartlett*, 55 Maine, 200; *State* v. *Lawrence*, 57 Maine, 574; *State* v. *Cleaves*, 59 Maine, 298; *State* v. *Banks*, 78 Maine, 490, 492; Rev. Stat. ch. 135, § 19.

We have assumed only for the purpose of discussion that what was done in the case at bar was an infringement of the privilege against self-incrimination. We do not intend, however, to lend any countenance to the truth of that assumption. The courts of New Jersey, in adopting the rule of law which is complained of here, have deemed it consistent with the privilege itself and not a denial of it. The reasoning by which this view is supported will be found in the cases cited from New Jersey and Maine, and see *Reg.* v. *Rhodes* (1899), 1 Q. B. 77; *Ex parte Kops* (1894), A. C. 650. The authorities upon the question are in conflict. We do not pass upon the conflict, because, for the reasons given, we think that the exemption from compulsory self-incrimination in the courts of the States is not secured by any part of the Federal Constitution.

*Judgment affirmed.*

MR. JUSTICE HARLAN, dissenting.

I feel constrained by a sense of duty to express my nonconcurrence in the action of the court in this present case.

Twining and Cornell were indicted for a criminal offense in a New Jersey court and having been found guilty by a jury were sentenced, respectively, to imprisonment for six and

four years. The judgment of conviction was affirmed, first in the Supreme Court of the State, afterwards in the Court of Errors and Appeals. The case was brought here for review and the accused assigned for error that the mode of proceeding during the trial was such as to deny them a right secured by the Constitution of the United States, namely, the right of an accused not to be compelled to testify against himself.

Upon this point the court, in the opinion just delivered, says: "We have assumed, only for the purpose of discussion, that what was done in the case at bar was an infringement of the privilege against self-incrimination." But the court takes care to add immediately: "We do not intend, however, to lend any countenance to the truth of that assumption. The courts of New Jersey, in adopting the rule of law which is complained of here, have deemed it consistent with the privilege itself."

It seems to me that the first inquiry on this writ of error should have been whether, upon the record before us, that which was actually done in the trial court amounted, in law, to a violation of that privilege. If the court was not prepared to hold, upon the record before it, that the privilege of immunity from self-incrimination had been actually violated, then, I submit, it ought not to have gone further and held it to be competent for a State, despite the granting of immunity from self-incrimination by the Federal Constitution, to compel one accused of crime to be a witness against himself. Whether a State is forbidden by the Constitution of the United States to violate the principle of immunity from self-incrimination is a question which it is clearly unnecessary to decide now, unless what was, in fact, done at the trial was inconsistent with that immunity. But, although expressly declaring that it will not lend any *countenance* to the *truth* of the *assumption* that the proceedings below were in disregard of the maxim, *Nemo tenetur seipsum accusare*, and without saying whether there was, in fact, any substantial violation of the privilege

of immunity from self-incrimination, the court, for the purpose only of discussion, has entered upon the academic inquiry whether a State may, without violating the Constitution of the United States, compel one accused of crime to be a witness against himself—a question of vast moment, one of such transcendent importance that a court ought not to decide it unless the record before it requires that course to be adopted. It is entirely consistent with the opinion just delivered that the court thinks that what is complained of as having been done at the trial of the accused was not, in law, an infringement of the privilege of immunity from self-incrimination. Yet, as stated, the court, in its wisdom, has forborne to say whether, in its judgment, that privilege was, in fact, violated in the state court, but simply, for the purpose of *discussion*, has proceeded on the *assumption* that the privilege was disregarded at the trial.

As a reason why it takes up first the question of the power of a State, so far as the Federal Constitution is concerned, to compel self-incrimination, the court says that if the right here asserted is not a Federal right that is an end of the case, and it must not go further. It would, I submit, have been more appropriate to say that if no ground whatever existed, under the facts disclosed by the record, to contend that a Federal right had been violated, this court would be without authority to go further and express its opinion on an abstract question relating to the powers of the State under the Constitution.

What I have suggested as to the proper course of procedure in this court is supported by our action in *Shoener* v. *Pennsylvania*, 207 U. S. 188, 195. That was a criminal case, brought here from the Supreme Court of Pennsylvania—the accused, who was convicted, insisting that the proceeding against him in the state court was in violation of the clause of the Federal Constitution declaring that no person shall be subject for the same offense to be twice put in jeopardy of life or limb. Upon looking into the record of that case we found that the accused had not been, previously, put in legal jeopardy for

the same offense. We went no further, but dismissed the writ of error, declining to consider the grave constitutional question pressed upon our attention, namely, whether the jeopardy clause of the Federal Constitution operated as a restraint upon the *States* in the execution of their criminal laws. But as a different course has been pursued in this case, I must of necessity consider the sufficiency of the grounds upon which the court bases its present judgment of affirmance.

The court, in its consideration of the relative rights of the United States and of the several States, holds, in this case, that, *without violating the Constitution of the United States*, a State can *compel* a person accused of crime to testify against himself. In my judgment, immunity from self-incrimination is protected against hostile state action, not only by that clause in the Fourteenth Amendment declaring that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," but by the clause, in the same Amendment, "nor shall any State deprive any person of life, liberty or property, without due process of law." No argument is needed to support the proposition that, whether manifested by statute or by the final judgment of a court, state action if liable to the objection that it abridges the privileges or immunities of National citizenship must also be regarded as wanting in the due process of law enjoined by the Fourteenth Amendment, when such state action substantially affects life, liberty or property.

At the time of the adoption of the Fourteenth Amendment immunity from self-incrimination was one of the privileges or immunities belonging to citizens, for the reason that the Fifth Amendment, speaking in the name of the People of the United States, had declared, in terms, that no person "shall be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law." That Amendment, it was long ago decided, operated as a restriction on the exercise of powers by the United States or by Federal tribunals and agencies, but

did not impose any restraint upon a State or upon a state tribunal or agency. The original Amendments of the Constitution had their origin, as all know, in the belief of many patriotic statesmen in the States then composing the Union, that under the Constitution, as originally submitted to the People for adoption or rejection, the National Government might disregard the fundamental principles of Anglo-American liberty for the maintenance of which our fathers took up arms against the mother country.

What, let me inquire, must then have been regarded as principles that were fundamental in the liberty of the citizen? Every student of English history will agree that long before the adoption of the Constitution of the United States certain principles affecting the life and liberty of the subject had become firmly established in the jurisprudence of England and were deemed vital to the safety of freemen, and that among those principles was the one that no person accused of crime could be compelled to be a witness against himself. It is true that at one time in England the practice of "questioning the prisoner" was enforced in Star Chamber proceedings. But we have the authority of Sir James Fitzjames Stephen, in his History of the Criminal Law of England, for saying that soon after the Revolution of 1688 the practice of questioning the prisoner died out. Vol. 1, p. 440. The liberties of the English people had then been placed on a firmer foundation. Personal liberty was thenceforward jealously guarded. Certain it is, that when the present Government of the United States was established it was the belief of all liberty-loving men in America that real, genuine freedom could not exist in any country that recognized the power of government to *compel* persons accused of crime to be witnesses against themselves. And it is not too much to say that the wise men who laid the foundations of our constitutional government would have stood aghast at the suggestion that immunity from self-incrimination was not among the essential, fundamental principles of English law. An able writer on English and American constitutional

law has recently well said: "When the first Continental Congress of 1774 claimed to be entitled to the benefit, not only of the common law of England, but of such of the English statutes as existed at the time of the colonization, and which they had by experience found to be applicable to their several local and other circumstances, they simply declared the basic principle of English law that English subjects going to a new and uninhabited country carry with them, as their birthright, the laws of England existing when the colonization takes place. . . . English law, public and private, continued in force in all the States that became sovereign in 1776, each State declaring for itself the date from which it would recognize it." Taylor, The Science of Jurisprudence, 436, 437. It is indisputably established that, despite differences in forms of government, the people in the colonies were a unit as to certain leading principles, among which was the principle that the people were entitled to "enjoy the rights and privileges of British-born subjects and the benefit of the common laws of England," 1 Story, § 163, and that (to use the words of the Continental Congress of 1774) "by emigration to the colonies, the people by no means forfeited, surrendered or lost any of those rights, but that they were then, and their descendants are now, entitled to the exercise and enjoyment of them as their local and other circumstances enable them to exercise and enjoy."

Can there be any doubt that at the opening of the War of Independence the people of the colonies claimed as one of their birthrights the privilege of immunity from self-incrimination? This question can be answered in but one way. If at the beginning of the Revolutionary War any lawyer had claimed that one accused of crime could lawfully be compelled to testify against himself, he would have been laughed at by his brethren of the bar, both in England and America. In accordance with this universal view as to the rights of freemen, Virginia, in its Convention of May, 1776—in advance, be it observed, of the Declaration of Independence—made a

Declaration (drawn entirely by the celebrated George Mason) which set forth certain rights as pertaining to the people of that State and to their posterity "as the basis and foundation of government." Among those rights (that famous Declaration distinctly announced) was the right of a person not to be compelled to give evidence against himself. Precisely the same declaration was made in Pennsylvania by its Convention assembled at Philadelphia on the fifteenth of July, 1776. Vermont, by its Convention of 1777, said: "Nor can he [a man accused of crime] be compelled to give evidence against himself." Maryland in 1776 declared that "no man ought to be compelled to give evidence against himself, in a court of criminal law." Massachusetts, in its constitution of 1780, provided that "no subject shall be . . . compelled to accuse, or to furnish evidence against himself." The same provision was made by New Hampshire in its constitution of 1784. And North Carolina as early as 1776 recognized the privilege of immunity from self-incrimination by declaring, in its constitution, that a man "shall not be compelled to give evidence against himself." These explicit declarations in the constitutions of leading colonies, before the submission of the National Constitution to the People for adoption or rejection, caused patriotic men, whose fidelity to American liberty no one doubted, to protest that that instrument was defective in that it furnished no express guaranty against the violation by the National Government of the personal rights that inhered in liberty. Nothing is made clearer by the history of our country than that the Constitution would not have been accepted by the requisite number of States, but for the understanding, on all sides, that it should be promptly amended so as to meet this objection. So, when the first Congress met, there was entire unanimity among statesmen of that day as to the necessity and wisdom of having a National Bill of Rights which would, beyond all question, secure against Federal encroachment all the rights, privileges and immunities which, everywhere and by everybody in America, were then recognized as

fundamental in Anglo-American liberty. Hence the prompt incorporation into the Supreme Law of the Land of the original amendments. By the Fifth Amendment, as already stated, it was expressly declared that no one should be compelled in a criminal case to be a witness against himself. Those Amendments being adopted by the Nation, the People no longer feared that the United States or any Federal agency could exert power that was inconsistent with the fundamental rights recognized in those Amendments. It is to be observed that the Amendments introduced no principle not already familiar to liberty-loving people. They only put in the form of constitutional sanction, as barriers against oppression, the principles which the people of the colonies, with entire unanimity, deemed vital to their safety and freedom.

Still more. At the close of the late Civil War, which had seriously disturbed the foundations of our governmental system, the question arose whether provision should not be made by constitutional amendments to secure against attack by the *States* the rights, privileges and immunities which, by the original Amendments, had been placed beyond the power of the United States or any Federal agency to impair or destroy. Those rights, privileges and immunities had not then, in terms, been guarded by the National Constitution against impairment or destruction by the States, although, before the adoption of the Fourteenth Amendment, every State, without, perhaps, an exception, had, in some form, recognized, as part of its fundamental law, most, if not all, the rights and immunities mentioned in the original Amendments, among them immunity from self-incrimination. This is made clear by the opinion of the court in the present case. The court says: "The exemption from testimonial compulsion, that is, from disclosure as *a witness of evidence against one's self, forced by any form of legal process, is universal in American law*, though there may be a difference as to its exact scope and limits. At the time of the formation of the Union, the principle that no person could be compelled to be a witness against himself

had become embodied in the common law and distinguished it from all other systems of jurisprudence. *It was generally regarded then, as now, as a privilege of great value, a protection to the innocent though a shelter to the guilty, and a safeguard against heedless, unfounded or tyrannical prosecutions.*" Such was the situation, the court concedes, at the time the Fourteenth Amendment was prepared and adopted. That Amendment declared that all persons born or naturalized in the United States and subject to its jurisdiction are citizens of the United States, "and of the State wherein they reside." Momentous as this declaration was, in its political consequences, it was not deemed sufficient for the complete protection of the essential rights of National citizenship and personal liberty. Although the Nation was restrained by existing constitutional provisions from encroaching upon those rights, yet so far as the Federal Constitution was concerned, the States could at that time have dealt with those rights upon the basis entirely of their own constitution and laws. It was therefore deemed necessary that the Fourteenth Amendment should, in the name of the United States forbid, as it expressly does, any *State* from making or enforcing a law that will abridge the privileges or immunities of citizens of the United States, or deprive any person of life, liberty or property without due process of law. The privileges and immunities mentioned in the original Amendments, and universally regarded as our heritage of liberty from the common law, were thus secured to every citizen of the United States and placed beyond assault by any government, Federal or state, and due process of law, in all public proceedings affecting life, liberty or property, were enjoined equally upon the Nation and the States.

What, then, were the privileges and immunities of citizens of the United States which the Fourteenth Amendment guarded against encroachment by the States? Whatever they were, that Amendment placed them beyond the power of any State to abridge. And what were the rights of life and liberty which the Amendment protected? Whatever they were, that Amend-

ment guarded them against any hostile state action that was wanting in due process of law.

I will not attempt to enumerate all the privileges and immunities which *at that time* belonged to citizens of the United States. But I confidently assert that among such privileges was the privilege of immunity from self-incrimination which the People of the United States, by adopting the Fifth Amendment, had placed beyond Federal encroachment. Can such a view be deemed unreasonable in the face of the fact, frankly conceded in the opinion of the court, that at common law, as well at the time of the formation of the Union and when the Fourteenth Amendment was adopted, immunity from self-incrimination was a privilege "universal in American law," was everywhere deemed "of great value, a protection to the innocent though a shelter to the guilty and a safeguard against heedless, unfounded or tyrannical prosecutions"? Is it conceivable that a privilege or immunity of such a priceless character, one expressly recognized in the Supreme Law of the Land, one thoroughly interwoven with the history of Anglo-American liberty, was not in the mind of the country when it declared, in the Fourteenth Amendment, that no State shall abridge the privileges or immunities of citizens of the United States? The Fourteenth Amendment would have been disapproved by every State in the Union if it had saved or recognized the right of a State to compel one accused of crime, in its courts, to be a witness against himself. We state the matter in this way because it is common knowledge that the compelling of a person to criminate himself shocks or ought to shock the sense of right and justice of every one who loves liberty. Indeed, this court has not hesitated thus to characterize the Star Chamber method of compelling an accused to be a witness against himself. In *Boyd* v. *United States*, 116 U. S. 616, 631, 633, will be found some weighty observations by Mr. Justice Bradley, delivering the judgment of the court, as to the scope and meaning of the Fourth and Fifth Amendments. The court, speaking by that eminent jurist, said:

"Now it is elementary knowledge, that one cardinal rule of the court of chancery is never to decree a discovery which might *tend to convict the party of a crime*, or to forfeit his property. And any *compulsory* discovery *by extorting the party's oath*, or compelling the production of his private books and papers, *to convict him of crime*, or to forfeit his property, *is contrary to the principles of a free government. It is abhorrent to the instincts of an Englishman; it is abhorrent to the instincts of an American. It may suit the purposes of despotic power; but it cannot abide the pure atmosphere of political liberty and personal freedom.*" Again: "We have already noticed the intimate relation between the two Amendments. They throw great light on each other. For, the 'unreasonable searches and seizures' condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a man 'in a criminal case to be a witness against himself,' which is condemned in the Fifth Amendment, throws light on the question as to what is an 'unreasonable search and seizure' within the meaning of the Fourth Amendment. And we have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself." These observations were referred to approvingly in *Counselman* v. *Hitchcock*, 142 U. S. 547, 580, 581.

I am of opinion that as immunity from self-incrimination was recognized in the Fifth Amendment of the Constitution and placed beyond violation by any Federal agency, it should be deemed one of the immunities of citizens of the United States which the Fourteenth Amendment in express terms forbids any State from abridging—as much so, for instance, as the right of free speech (Amdt. II), or the exemption from cruel or unusual punishments (Amdt. VIII), or the exemption from being put twice in jeopardy of life or limb for the same offense (Amdt. V), or the exemption from unreasonable searches

and seizures of one's person, house, papers or effects (Amdt. IV). Even if I were anxious or willing to cripple the operation of the Fourteenth Amendment by strained or narrow interpretations, I should feel obliged to hold that when that Amendment was adopted all these last-mentioned exemptions were among the immunities belonging to citizens of the United States, which, after the adoption of the Fourteenth Amendment, no State could impair or destroy. But, as I read the opinion of the court, it will follow from the general principles underlying it, or from the reasoning pursued therein, that the Fourteenth Amendment would be no obstacle whatever in the way of a state law or practice under which, for instance, cruel or unusual punishments (such as the thumb screw, or the rack or burning at the stake) might be inflicted. So of a state law which infringed the right of free speech, or authorized unreasonable searches or seizures of persons, their houses, papers or effects, or a state law under which one accused of crime could be put in jeopardy twice or oftener, at the pleasure of the prosecution, for the same offense.

It is my opinion also that the right to immunity from self-incrimination cannot be taken away by any State consistently with the clause of the Fourteenth Amendment that relates to the deprivation by the State of life or liberty without due process of law. This view is supported by what Mr. Justice Miller said for the court in *Davidson* v. *New Orleans*, 96 U. S. 97, 101, 102. That great judge, delivering the opinion in that case, said: "The prohibition against depriving the citizen or subject of his life, liberty, or property without due process of law, is not new in the constitutional history of the English race. It is not new in the constitutional history of this country, and it was not new in the Constitution of the United States when it became a part of the Fourteenth Amendment, in the year 1866." After observing that the equivalent of the phrase "due process of law," according to Lord Coke, is found in the words "law of the land," in the Great Charter, in connection with the guarantees of the rights of the subject

against the oppression of the crown, the court said: "In the series of amendments to the Constitution of the United States, proposed and adopted immediately after the organization of the government, which were dictated by the jealousy of the States as further limitations upon the power of the Federal Government, it is found in the Fifth, in connection *with other guarantees of personal rights of the same character.*" *Among these guarantees* this court distinctly said was protection against being twice tried for the same offense, and protection "*against the accused being compelled, in a criminal case, to testify against himself.*" Again, said the court: "It is easy to see that when the great barons of England wrung from King John, at the point of the sword, the concession that neither their lives nor their property should be disposed of by the crown, except as provided by the law of the land, they meant by 'law of the land' the ancient and customary laws of the English people, or laws enacted by the Parliament of which those barons were a controlling element. It was not in their minds, therefore, to protect themselves against the enactment of laws by the Parliament of England. But when, in the year of grace 1866, there is placed in the Constitution of the United States a declaration that 'no State shall deprive any person of life, liberty, or property without due process of law,' can a State make any thing due process of law which, by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition to the States is of no avail, or has no application where the invasion of private rights is affected under the forms of state legislation."

I cannot support any judgment declaring that immunity from self-incrimination is not one of the privileges or immunities of National citizenship, nor a part of the liberty guaranteed by the Fourteenth Amendment against hostile state action. The declaration of the court, in the opinion just delivered, that immunity from self-incrimination is of great value, a protection to the innocent and a safeguard against unfounded and tyrannical prosecutions, meets my cordial

approval. And the court having heretofore, upon the fullest consideration, declared that the compelling of a citizen of the United States, charged with crime, to be a witness against himself, was a rule abhorrent to the instincts of Americans, was in violation of universal American law, was contrary to the principles of free government and a weapon of despotic power which could not abide the pure atmosphere of political liberty and personal freedom, I cannot agree that a State may make that rule a part of its law and binding on citizens, despite the Constitution of the United States. No former decision of this court requires that we should now so interpret the Constitution.